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Date of Issuance
April 20, 2009

Decision 09-04-036 April 16, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Utility Consumers' Action Network, Complainant, vs. SBC Communications, Inc. dba SBC Pacific Bell Telephone Company (U1001C) and related entities (collectively SBC), Defendants.	Case 05-11-011 (Filed November 14, 2005)

ORDER MODIFYING DECISION 08-08-017 AND DENYING REHEARING OF DECISION 08-08-017 AS MODIFIED HEREIN

This order denies the application for rehearing of Decision ("D.") 08-08-017 ("Decision") brought by AT&T California, after making modifications to the Decision. As discussed more fully below, our review of the numerous claims made in the application for rehearing shows that these claims do not demonstrate legal error. However, several of the rehearing application's claims appear to misunderstand the Decision, showing that it could have explained its holdings more clearly. Also, in the course of our review of the Decision we noted that a citation to a tariff was inaccurate. We will further explain our Decision in this order, modify the Decision to explain its reasoning more clearly, and correct inconsistencies and inaccuracies. Once these changes have been made, AT&T's application for rehearing of D.08-08-017, as modified, will be denied.

I. PROCEEDINGS THAT OCCURRED PRIOR TO THIS ORDER

In November, 2005, the Utility Consumers' Action Network (UCAN) filed this complaint case against SBC Communications Inc., which currently does business in

California as AT&T California ("AT&T"). The complaint alleged that AT&T had not complied with Public Utilities Code[1] section 2883, which contains, among other things, the following mandate: "All local telephone corporations … shall, to the extent permitted by existing technology and facilities, provide every existing and newly installed residential telephone connection with access to '911' emergency service regardless of whether an account has been established." The service required by section 2883, referred to here as "warm line" service, allows a party to call 911 from a residential telephone even though no other services are being provided at that time.[2] (E.g., Decision at p. 22, quoting AT&T's tariff, Schedule Cal PUC No. A.2.2.1.2.I..)

UCAN asserted that AT&T's conduct did not comply with section 2883 because the carrier had placed a 180-day limit on the amount of time that warm line service was provided at residences where billed telephone service had been discontinued, even though section 2883, subdivision (a), does not allow carriers to place limits on the amount of time that warm line service is available. (Post-Hearing Brief in Support of UCAN's Complaint, August 24, 2006 ("UCAN's Opening Brief") at pp. 7-8, 37.) UCAN further alleged that AT&T did not provide any warm line service at newly constructed residences. (UCAN's Opening Brief at p. 23.) Instead, AT&T waited until a customer ordered billed telephone service before it provided any service at newly constructed residences. UCAN also alleged that AT&T's practices contravened section 2883, subdivision (c), which requires carriers to inform customers of the availability of warm line service. (UCAN's Opening Brief at pp. 48-51.) The complaint sought penalties in the amount of $62 million, asked for reparations to AT&T's customers, and for disgorgement of $191 million in corporate profits allegedly earned as a result of AT&T's warm line policy. (UCAN's Opening Brief at p. 57.)

[1] In this document section references are to the Public Utilities Code, unless otherwise specified.

[2] Warm line service is also referred to as "warm dialtone" and "quick dialtone" ("QDT"). For convenience, the term "warm line service" is used here, although other terms appear in quotations. Warm line service is contrasted with "billed service," which residential customers order and pay for.

AT&T contested UCAN's assertion that its conduct contravened section 2883. AT&T did not dispute that it followed a policy of discontinuing warm line service after approximately 180 days. Nor did AT&T disagree with the claim that it failed to provide any warm line service at newly constructed residences until a customer ordered billed service. (E.g., Opening Brief of Pacific Bell Telephone Company, filed August 25, 2006 ("AT&T's Opening Brief") at pp. 1, 3.) There was also little significant dispute about the types of notice AT&T provided regarding warm line service. (Decision at p. 22.) Instead of contesting the underlying facts, AT&T mostly asserted that its conduct was permissible, under certain readings of section 2883. Thus the main questions in this proceeding concerned not whether AT&T had engaged in certain conduct, but whether that conduct complied with section 2883's requirements.

AT&T asserted that its policy of discontinuing warm line service was permissible under section 2883 because of a short supply of telephone numbers. According to AT&T, numbering concerns allowed it to terminate warm line service after approximately 180 days because "technology and facilities" did not exist to provide service indefinitely, and because providing warm line service might interfere with its ability to serve to other subscribers. (AT&T's Opening Brief at pp. 9-11.)

AT&T further claimed that it was not required to provide warm line service at newly constructed residences because the statute was written in such a way that there was no time period during which that requirement came into force. According to AT&T, a "telephone connection" did not exist at a new residence until a customer ordered billed service, and section 2883 only requires warm line service to be provided once a telephone connection is established. (AT&T's Opening Brief, at pp. 4-6.) Finally, AT&T claimed that the language of the statute did not require it to provide any notice to customers over and above the notice it was providing. (E.g., Appeal of Presiding Officer's Decision, November 9, 2007, at pp. 21-24.)

The early phases of the proceedings in this case were coordinated with C.05-11-012, a substantially similar complaint UCAN had filed against Cox Communications ("Cox"), but the two proceedings were not formally consolidated. After

the parties in these two proceedings contested motions to dismiss and completed discovery, UCAN and Cox reached an agreement allowing for the dismissal of C.05-11-012, which was authorized by the Commission in D.07-07-020.[3] Before the commencement of scheduled hearings in this proceeding, both AT&T and UCAN stipulated that the merits of this case would be submitted to the Presiding Officer solely on the basis of prepared testimony, exhibits, and briefing. (Decision at p. 4.)

After establishing the extent of the record and receiving briefs and replies, the Presiding Officer reviewed the record and issued a Presiding Officer's Decision, or "POD," finding all aspects of AT&T's warm line policy violated section 2883. The POD imposed a penalty of approximately $1.7 million based on the amount of time AT&T had kept its policy in place, and required AT&T to conform its warm line practices to those required by the statute. (Decision at p. 58.) The POD did not require reparations or disgorgement, but it did conclude that AT&T should not be able to shield itself from liability in any civil court proceedings resulting from its actions. (Decision at pp. 34-35.)

Pursuant to section 1701.2, subdivision (a), AT&T made an appeal of the POD to the full Commission. The POD was modified to address the issues contained in AT&T's appeal. These modifications further explained the Decision's approach but did not alter the relief adopted in the POD. We adopted the modified POD as our decision in this case, D.08-08-017.

AT&T filed a timely application for rehearing of the Decision to which UCAN did not respond. The rehearing application disputes many of the Decision's findings, asserting that these findings were "unlawful and not supported by the record." (Rehg. App. at pp. 11, 11-32.) The rehearing application also claims that certain of the Presiding Officer's determinations on the admissibility of evidence constitute prejudicial error. (Rehg. App. at pp. 36-39.) Additionally, the rehearing outlines a number of legal principles that it claims prevent the Commission from ruling against AT&T, including:

[3] In D.07-07-020 the Commission also determined that AT&T and Cox had made impermissible ex parte contacts with Commission decisionmakers and imposed a fine of $40,000 each against AT&T and Cox.

burden of proof, statutes of limitation, due process, and an alleged "safe harbor" that AT&T claims insulates it from liability. (E.g., Rehg. App. at pp. 3-6, 35, 39-40.)

Although these claims of error are numerous and wide-ranging, they generally fall into one of two categories.[4] The first category contains disputes about the record, and the inferences we drew from the record. In the second category are claims that rely on legal theories and principles to assert that we are required to reach conclusions that favor AT&T's position, or are legally barred from penalizing AT&T for violating section 2883. These two categories of claims are discussed below, beginning with the rehearing application's evidentiary claims.

II. THE DECISION PROPERLY EVALUATED THE RECORD, AND WE WILL MODIFY THE DECISION TO MAKE THIS CLEAR

The rehearing application asserts that the majority of the Decision's factual findings do not properly evaluate the record. These allegations are discussed below, in the order in which the Decision addresses these topics. In considering the various claims AT&T makes about our factual conclusions, it is important to bear in mind that we determined to assess one penalty against AT&T for all of its conduct relating to warm line service, which we found constituted a single "policy." (Decision at pp. 27, 29.) Because we imposed a single penalty, claims that the record on one particular aspect of AT&T's warm line policy should be re-evaluated do not demonstrate that AT&T's warm line policy, as a whole, is permissible, or that the imposition of a penalty is in error.

A. The Decision Properly Concluded That The "Technology [and] Facilities" Necessary to Provide Warm Line Service Are Present When Telephone Service is Discontinued, and That Section 2883 Does Not Allow Carriers to Provide Warm Line Service For Only A Limited Time.

The Decision first considered UCAN's allegation that AT&T failed to satisfy section 2883's requirements because when residential phone service was

[4] AT&T's rehearing application itself categorizes its claims as involving either: (i) a lack of evidentiary support or inconsistencies within the decision or with previous decisions, or (ii) "purely legal" issues. (Rehg. App. at p. 2.)

disconnected (either voluntarily or involuntarily), AT&T provided warm line service for approximately six months, but then cut the service off.[5] The facts underlying this claim were not in dispute. (See Decision at p. 52 (Finding of Fact 6).) UCAN presented testimony stating that AT&T, from time to time, ran an automated program that terminated warm line service that had been in place for longer than 180 days. (Exhibit 1 at p. 7.) AT&T's Opening Brief, at page 1, states that AT&T "readily admits" that it was "failing to provide warm line service indefinitely...."

The Decision found that, in the case of disconnected service, the physical means existed to provide warm line service. The Decision further concluded that section 2883 imposed upon AT&T a "continuing obligation" to provide warm line service (as opposed to a temporary, 180-day, obligation) after billed service was disconnected. (Decision at p. 9.) The Decision made this finding as a matter of ordinary statutory construction, because section 2883 contains no language suggesting that its requirements apply only for a limited period of time. The Decision specifically noted that the statute only contained two provisions qualifying the requirement that carriers such as AT&T provide warm line service.[6] The Decision stated that it was not legally permissible to curtail warm line service unless these qualifying provisions—which it considered to form a single exception to the statute's requirement—applied. Consistent with its approach to analyzing the issues presented in this case, the Decision stated that if AT&T claimed that its warm line policies were justified by "the unavailability of telephone numbers or other facilities[,]" then it would be making a "specific defense" for which AT&T had the burden of proof. (Decision at p. 9.)

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[5] The Decision considered two separate fact patterns: when service was disconnected and the former customer moved out, and when service was disconnected and the former customer remained. It found these fact patterns were essentially the same for the purposes of its analysis. (Decision at p. 10.)

[6] Section 2883, subdivision (a), states that the statute's requirements apply "to the extent permitted by existing technology or facilities…." In subdivision (e), the statute provides an exception to its requirements, stating:

> Nothing in this section shall require a local telephone corporation to provide "911" access pursuant to this section if doing so would preclude providing service to subscribers of residential telephone service.

The finding that AT&T terminated warm line service after 180 days is based on uncontested evidence in the record and the plain meaning of the statute—and AT&T does not claim that this aspect of the Decision is in error. Instead, the rehearing application challenges the analytic framework the Decision adopted to determine whether AT&T's policy of terminating warm line service after 180 days was permissible under section 2883. AT&T claims the Commission cannot make the company responsible for demonstrating that its policies were necessitated by numbering concerns, because doing so would allow UCAN to prove AT&T violated the statute without taking into account section 2883's "existing technology and facilities" language. (Rehg. App. at p. 4.) According to AT&T, UCAN was required to bear the burden of demonstrating that no numbering issues interfered with AT&T's ability to provide warm line service in order to make a case against AT&T. The rehearing application claims, at pages 5-6 (footnotes and internal quotation marks omitted), that, under the Decision's standard:

> … all UCAN (and presumably any complainant) has to prove to carry the burden of proof for a statutory violation is that defendant is a telephone company, that there are existing and/or new residential telephone connections ... and that one or more residential telephone connections do not have warm dial tone.

This claim reads too much into some of the language the Decision used to describe the legal framework that supports its approach, and does not consider the analysis the Decision actually applied to the issues. The Decision explicitly considered whether or not existing technology and facilities allowed AT&T to provide warm line service as part of its analysis of whether AT&T contravened section 2883's requirements. The Decision found that there was no question that facilities existed to provide warm line service at the time service was disconnected. Finding of Fact 5, at page 52, states:

> When voice telephone service has been discontinued voluntarily by the customer or involuntarily by the carrier, the necessary technology and facilities exist and are in place to provide 911 access.

The Decision further found that section 2883 does not allow carriers to limit the amount of time for which warm line service is provided. Rather, the only

legitimate basis for curtailing warm line service was the statutory "exception" based on a lack of technology or facilities or the inability to provide service to billed service subscribers.[7] These findings largely reflect the position advanced by UCAN. (UCAN's Opening Brief at pp. 33-34, citing UCAN's Exhibit 1 at p. 14.)

In addition, the Decision held that AT&T's blanket, state-wide restrictions on warm line service bore little relationship to numbering concerns that were transitory and limited to specific area codes. In this respect, the Decision also implicitly adopted UCAN's position. (E.g., Decision at p. 21; compare UCAN's Opening Brief at pp. 35, 37-38.) Thus, a review of the analysis the Decision undertook shows that the Decision did not make AT&T responsible for proving "an element of UCAN's claims" as the rehearing application alleges. (Rehg. App. at p. 4.) Rather, UCAN successfully presented evidence and argument that supported its claim: AT&T's policy violated the statute on its face, and the carrier attempted to justify that conduct with claims not directly related to the statute's provisions.

If the Decision's overall approach to evaluating the evidence is kept in mind, it becomes clear that the finding that AT&T should be penalized "unless" the company showed that the reason it gave to justify its conduct—numbering issues—allowed it to terminate warm line service after 180 days does not require AT&T to prove an element of UCAN's claim. (Decision at p. 9.) Further, as explained below at pages 38-45, we applied relevant evidentiary concepts relating to the burden of proof to conclude that AT&T was responsible for explaining why its conduct was allowable in this case, which involved a statute containing a general rule that warm line service be provided and a limited qualification allowing such service to be restricted under specific circumstances.

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[7] These holdings appeared in the POD's discussion of warm line service at residences where service was disconnected, and were restated more forcefully in the analysis of AT&T's appeal of that portion of the POD. (Decision at p. 44.) There, the Decision stated:

> Absent facilities or numbering constraints in specific areas, we reject the notion (and we believe the legislature would agree) that emergency access was meant to be available on an interim basis.

However, as discussed below at page 44, language in the Decision that limits the elements that need to be proven to make a claim under section 2883 should be clarified to make the Decision's description of its analytic approach consistent with the analysis that it actually undertook. In addition, the Decision's discussion of the statute's standards, its discussion of the burden of proof, and its discussion of the warm line requirements that apply when service is disconnected should all be modified to reflect the fact that the Decision's analysis reached several of its conclusions as a result of UCAN's analysis of this case. We will modify the Decision to achieve this result.

B. The Finding That a "Telephone Connection" Exists At New Residences Before AT&T Implements A Customer's Order For Billed Service Is Based on A Proper Evaluation of The Record.

After addressing AT&T's practice of discontinuing warm line service at residences where telephone service was previously provided, we addressed AT&T's policies at newly constructed residences. At these residences, AT&T did not provide any service—including warm line service—until a customer requested that billed service be activated and, presumably, opened an account.[8]

Section 2883 requires AT&T to "provide every… newly installed residential telephone connection with access to '911' emergency service regardless of whether an account has been established." However AT&T contended that section 2883 should be read to permit its practice of not providing warm line service at new residences. According to AT&T, section 2883 made the existence of a "telephone connection" a prerequisite to providing warm line service. AT&T further claimed that certain work it did not perform until after it received a request to activate billed service was an integral part of a "telephone connection[,]" meaning that AT&T could not provide warm line service at new residences because the requisite "telephone connection" never existed.

[8] Again, the principle facts are not in dispute. UCAN's testimony states that AT&T does not provide warm line service at newly constructed residences until an account has been established and AT&T "readily admits" that it does not provide always service at, newly constructed residences where "no one has yet activated service." (Exhibit 1, at pp. 18-19; AT&T Opening Brief, at p. 1.)

(Decision at p. 11; AT&T's Opening Brief at pp. 4-5.) UCAN, on the other hand, claimed that, once wiring and other necessary equipment running to AT&T's "central office" became available "within the general vicinity of inside wiring in new residential units," then a telephone connection existed. (Decision at p. 11.)

To evaluate these claims, we reviewed both parties' testimony about the physical structure of the telephone network. (Decision at p. 11.) In general, AT&T and UCAN had presented similar testimony. The Decision described the most complicated scenario—a building or complex with several residences. In this case, each individual residence would have its own "outside plant infrastructure" (e.g., telephone wiring, jacks, etc.) and the infrastructure in each residence would connect to that residence's "Minimum Point of Entry." Further infrastructure would, in turn, connect all of the residences to a primary Minimum Point of Entry serving the entire building or complex. At this point, AT&T's network would connect to the infrastructure in the building. AT&T's facilities would consist of wiring and related infrastructure, collectively referred to as a "CT facility," running from the primary Minimum Point of Entry to the "main distribution frame" in an AT&T facility called a "central office." (See Decision at p. 12, fn. 10.)

The record showed that these elements (outside plant infrastructure, the Minimum Point of Entry, and the CT facility) were often put into place "even before the new residence has been fully constructed." (AT&T's Opening Brief at p. 4 (citing record material).) If these network elements were in place, then warm line service could be provided as long as a residence had a street address, that address was input into AT&T's computer systems, a telephone number was assigned, "central office work" (consisting of assigning and wiring central office equipment) was performed, and the telephone line was limited to ensure it only provided warm line service. (Decision at pp. 12, 15, discussing UCAN's Exhibit 1 and AT&T's Exhibit 6.) Relying on this description of the network's elements and the way it functioned, AT&T asserted that a "telephone connection" did not exist until a customer ordered billed service and AT&T performed certain steps in response to that request. (Decision at p. 16, citing AT&T's Opening Brief

at p. 4.) Implicit in this claim is the fact that once a residence has billed service, warm line service is unnecessary.

We considered this contention in light of the language of section 2883, and found that the statute specifically requires that warm line service be provided "regardless of whether an account has been established." An interpretation of the statute that required a carrier to provide warm line service only after a customer has requested billed service and established an account would ignore an important requirement contained in the statute. (Decision at p. 14.) As a result, the Decision did not adopt AT&T's interpretation of the term "telephone connection."

In addition, we explained that AT&T's interpretation did not make sense in light of the statute's purposes or its language. Relying on a straightforward reading of the statute, we dismissed as a "tautology" the assertion that the statute should be interpreted so that an event that made warm line service unnecessary was found to be the event that triggered the requirement to provide warm line service. (Decision at p. 14.) The Decision found, instead, that section 2883 should be read to impose a requirement on AT&T. We stated that the statute required AT&T to "do something:" take the steps that are necessary to provide access to 911 emergency service at newly constructed residences. (*Ibid.*) With this language, we distinguished the operational steps that are necessary to provide service over a telephone connection from the elements that make up the telephone connection itself.[9]

Having conducted this analysis, we considered the network elements and operational steps described in the record to determine what elements comprised a "telephone connection" as that term is used in section 2883. In Findings of Fact 9 and 10, on page 53, we found:

> 9. If a local loop has been installed between the residential unit and AT&T's central office, and the local loop is

[9] This distinction properly construes the statute. Section 2883 requires carriers to provide warm line service once a telephone connection exists. As discussed in the main text above, if the materials and actions that are undertaken in order to provide service are confused with the elements that make up a telephone connection itself then the statue will not require anything, which is an illogical result.

> connected to the residential unit's demarcation point [Minimum Point of Entry], the additional steps necessary to complete a telephone connection capable of voice transmission are relatively few and are automated. One manual activity, placing a jumper wire in the central office, generally takes a few minutes and is estimated to cost $18.99.
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> 10. Once a CT facility is available and the residential unit is wired to the primary minimum point of entry (or secondary minimum point of entry, in the case of multiple dwelling units), a telephone connection exists.

These findings hold that some of the elements of a "telephone connection" described in AT&T's testimony were in fact steps that AT&T took to activate that connection and make it capable of "voice transmission [,]" i.e., carrying a telephone call. We disagreed with AT&T's contention that these steps should be considered to be part of the connection itself after considering both the nature of the work involved (mostly "automated" work involving "few" steps) and concluding that we would not read the statute in a way that rendered one of its requirements meaningless. The Decision specifically noted that our responsibility is to give effect to the Legislature's requirements. (Decision at p. 14.)

The rehearing application asserts the Decision's factual findings are in error for a number of reasons. Primarily, the rehearing application takes issue with the finding that the final steps AT&T takes in order to make a telephone connection capable of handling calls are not elements of the telephone connection itself. According to the rehearing application, the Decision agreed with AT&T's testimony that "all the physical piece parts" that are necessary to place a call must be in place for a telephone connection to exist. (Rehg. App. at p. 12.) AT&T relies on language on page 12 to assert that when the Decision concludes that a telephone connection can exist before AT&T takes the final steps to make the connection operational, it makes inconsistent holdings.

However, this claim misunderstands the Decision's findings. As noted above, the Decision explicitly distinguished the "remaining steps" that section 2883 requires AT&T to take to begin providing service from the "newly installed telephone

connection" itself. (Decision at p. 15.) The language on page 12 that appears to list the final steps that AT&T takes to make a telephone connection operational as part of the telephone connection itself is incidental language that does not establish a holding. We will clarify this language to avoid any internal inconsistency,[10] along with any other similar language.

The rehearing application further asserts that the Decision's discussion of AT&T's appeal on this issue is in error. First, the rehearing application claims that the Decision does not rely on the record. This claim, again, is based on a misunderstanding of the Decision. The rehearing application mistakenly asserts that we "agree[d]" that the record showed the final steps necessary to make a telephone connection operational were part of the connection itself. (Rehg. App. at p. 13.) Based on this misunderstanding of the record, the rehearing application asserts that the record does not allow us to distinguish between the final steps taken to activate a telephone connection and the telephone connection itself. Because these allegations do not contend with the Decision's findings or its description of the record they do not demonstrate error.

Second, the rehearing application argues that the Decision cannot rely on the fact that AT&T's reading of the phrase "telephone connection" would "nullify any protection offered by the statute" to reject an interpretation finding that the final steps

[10] The rehearing application cites *Cal. Portland Cement Co. v. Public Utilities Com.* (1957) 49 Cal.2d 171 as authority for the proposition that inconsistencies in a decision result in legal error, but this case is not on point. (Rehg. App. at p. 11.) Some of the Decision's incidental language may not be clear, and, as a result, could be subjected to an interpretation that produced an inconsistency with the Decision's main holdings. However, this lack of clarity will be corrected by modification and will not become part of the final order. Nor does this language result in a fundamental contradiction between two of the Decision's main holdings, as was the case in *Cal. Portland Cement Co. v. Public Utilities Com., supra*. Other authority cited by the rehearing application stands for the proposition that an administrative decision (especially by a federal agency) should explain its reasoning. More specific and relevant decisions by the California Supreme Court, describes the statutory requirement that specifically applies to this Commission. Under section 1705, we must make separately stated findings of fact and conclusions of law so that a decision "afford[s] a rational basis for judicial review, and assist[s] the reviewing court to ascertain the principles relied upon by the [C]ommission…." (*Cal. Manufacturers Ass'n v. Public Utilities Com.* (1979) 24 Cal.3d 251, 258-259; see also, *Greyhound Lines, Inc. v. Public Utilities Com.* (1967) 65 Cal.2d 811, 813.) The rehearing application does not explain why AT&T contends that the Decision fails to meet this standard. (Rehg. App. at p. 12.)

AT&T takes to activate a telephone connection are elements of the connection itself. The rehearing application asserts that the "circumstances that may cause all of the components to come into existence are irrelevant to the question of when the obligation attaches to provide warm dialtone." (Rehg. App. at p. 15.) This claim is confusing, but if the rehearing application is attempting to argue that the Commission may not evaluate the various network components and activities described in the parties' testimony to determine which of them form part of a telephone connection, then it provides no argument or authority to support this position. The fact that "AT&T has argued[] that [the warm line] obligation cannot, under the express terms of [section] 2883 [subd.] (a), attach before there is a telephone connection in existence" is not enough to establish that the Decision is in error. (Compare, Rehg. App. at p. 5.) The fact that a telephone connection must exist before the obligation to provide warm line service comes into force is not in dispute here. The question is: what elements make up a telephone connection? The Decision answered that question differently from the way AT&T's witnesses answered it, and simply noting that AT&T had provided a different answer during the course of the proceeding does not demonstrate error.

The rehearing application also asserts that it is error for the Decision to consider what the Legislature intended in adopting section 2883 as it determined what constituted a telephone connection. (Rehg. App. at p. 15.) According to AT&T, the statute clearly provides that a telephone connection must be established before the obligation to provide warm line service commences and the Decision "admits that [section] 2883 is unambiguous." (Rehg. App. at p. 15.) As discussed above, the fact that the statute unambiguously states that a telephone connection must exist before local exchange companies has little bearing on the question of what elements make up the telephone connection itself.

Further, when the Decision holds that it will not interpret the phrase "telephone connection" in a way that makes the statute's requirements superfluous, the Decision properly considers the underlying purpose of the statute, concluding that it does "not believe that the [L]egislature contemplated a meaningless act in its adoption of

[section] 2883." The rehearing application's claim that this approach is "speculation" and "legal error" is unsupported, and does not state the law correctly. The first step in determining a statute's meaning is to look to its actual language, keeping the purposes of the statute in mind and giving significance to each of its words. (*Pacific Gas and Electric Company v. Dept. of Water Resources* (2003) 112 Cal.App.4th 477, 495; see also *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239; Decision at p. 14, citing *Watson Land Co. v. Shell Oil* (2005) 130 Cal.App.4th 69.) Thus, the Decision's finding that the statute can be understood without applying second-order techniques of statutory interpretation (such as consulting the legislative history) does not prevent us from considering the overall purpose of the statute when determining its requirements.

The Decision's interpretation is also based on section 2883's plain language. The Decision adopts a reading of section 2883, subdivision (a) that gives meaning to all of its words. AT&T's reading of the statute does not: AT&T specifically considers whether or not a customer has requested billed service (thereby indicating that it will establish an account) in determining whether or not a telephone connection exists. The Decision does not commit in legal error when it adopts a reading of section 2883 that takes account of both the statute's purpose and language. (*Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411.)

Further, the rehearing application alleges that "[n]othing in the statute supports" one of the Decision's results: AT&T is required to place jumper cables between the "telephone connection" and the telephone network. The rehearing application places significance on the fact that section 2883 does not specifically require AT&T to make these connections. (Rehg. App. at p. 15.) Similarly, at page 12, the rehearing complains that the Decision "require[es] AT&T to construct the missing network to provide warm dial tone." (Rehg. App. at p. 12.) These claims assume that the statute includes any *physical* aspect of the telephone network that is used to provide service within the ambit of a "telephone connection." However, the rehearing application provides no authority or argument to support this assumption. Contrary to AT&T's

claims, the statute does not state that "the warm dial tone obligation is not triggered until all parts are existing." (Compare, Rehg. App. at p. 15.) Section 2883 states that every telephone connection must be provided with warm line service regardless of whether an account has been established. The Decision is not in error for failing to follow a requirement that is not contained in the language of the statute.

The rehearing application also asserts that the Decision's interpretation of section 2883's requirements is in error because the Decision concludes that AT&T does not have an obligation to provide warm line service at a new residence if it is unaware that a telephone connection "is ready to obtain emergency access." (Decision at p. 40.) The Decision concluded that AT&T had an obligation to provide warm line service once a telephone connection (as defined in the Decision existed), "if requested by the residential owner or occupant." (Decision at p. 56.) This conclusion properly reflects the fact that the elements of a "telephone connection" that are on the customer's side of the primary Minimum Point of Entry are the responsibility (and the property of) someone other than AT&T (e.g., the building owner). Without information from the building owner or occupant AT&T would not be able to determine if a telephone connection had been completely "installed[.]" (Cf., Pub. Util. Code, § 2883, subd. (a).)

The rehearing application asserts this approach illegally reads additional requirements into section 2883. (Rehg. App. at p. 14.) However, the Decision simply describes the Commission's view of the circumstances under which the statute's requirements could reasonably be found to attach to a carrier. We will modify the Decision to make its approach clear. The rehearing application's further claim—that because these is no evidence of such requests in the past it cannot be found to have violated section 2883—is unavailing. The fact that there is no record of anyone requesting a service that AT&T categorically refused to provide does not show that AT&T's policy of denying that service in all circumstances complies with section 2883.

C. The Decision Properly Found That AT&T Did Not Show That Its Warm Line Policy Had Any Direct Relationship to Shortages of Telephone Numbers.

1. The Decision's Conclusions on Numbering Issues Are Based on Proper Consideration of The Record.

After concluding that AT&T's policy of curtailing (or not providing) warm line service did not comply with section 2883's general requirements, the Decision next addressed AT&T's contention that its conduct was permissible because the statute contained "limitations" on its general requirements that justified AT&T's conduct. (E.g, AT&T's Opening Brief at pp. 2, 6.) We had previously found that the two "limitations" relied upon by AT&T created an exception to the statute's general requirements, which the Decision called "the 'existing technology and facilities' exception[.]"[11] (Decision at p. 6.) Those two provisions were the portion of section 2883, subdivision (a), which requires warm line service to be provided "to the extent that existing technology and facilities permit[,]" and section 2883, subdivision (e), which allows a local telephone company not to provide warm line service if doing so would preclude that company from providing billed service to its subscribers. The Decision determined to treat the claim that these provisions allowed AT&T to curtail (or not provide) warm line service as a defense raised by AT&T. With respect to this defense, we found that AT&T had the burden of proving that its warm line policies were permissible under the statute. (Decision at pp. 6, 17.)

When we considered AT&T's evidence on numbering issues, we found this material was too generic to support AT&T's claim. That is, the material relied upon by AT&T showed that the supply of available telephone numbers was being depleted, but AT&T did not present any further material showing that the way in which numbers were

[11] Treating these provisions as an exception responded to the statutory requirement that warm line service be provided "to the extent permitted" by a local exchange carrier's facilities. This approach also allowed us to group the questions presented by AT&T's numbering claims into a single issue, and to analyze that issue in a way that acknowledged that AT&T was both the party advancing this claim and the party with the necessary information.

being depleted resulted in any specific, "existing" limitations in its technology and facilities, or meant that providing warm line service as the statue otherwise required would have precluded it from providing billed service to other subscribers. (E.g., Decision at p. 18 (discussing FCC material).) Put another way, AT&T only "identifie[d] some facts" showing that it was contending with numbering issues, but it failed to provide any material describing the "extent" to which these numbering issues affected its "technology or facilities[.]" (*Ibid.*; cf., Pub. Util. Code, § 2883, subd. (a).) Moreover, as a factual matter, the material presented by AT&T did not take into account the fact that the supply of available telephone numbers was also being replenished each time a new area code was established. (*Ibid.*)

We also noted that the record showed that when the supply of available telephone numbers became restricted, this occurred only in certain specific area codes, for a specific period of time. (Compare, Decision at p. 18, Reply Brief of Pacific Bell Telephone Company ("AT&T's Reply Brief") at pp. 11, 15.) That is, limitations in the availability of telephone numbers did not occur all at once, nor were they state-wide. We noted the disparity between AT&T's policy (which curtailed warm line service on a permanent, state-wide, basis) and the nature of the numbering shortages AT&T identified (which were transitory and area-code specific). (Decision at p. 21.) The Decision found that the record suggested that AT&T had adopted its warm line policy "without the analysis of facilities and equipment availability, number availability, or the needs of customers in the specific areas affected." (Decision at pp. 29-30.)

These findings were based on our careful evaluation of the material in the record describing numbering issues, and we described that evaluation in the Decision. We considered our past decisions approving area code splits and overlays, and found that, in this context, this material was "equivocal" because it provided no definitive support for AT&T's position. (Decision at p. 52.) Our decisions showed that there was a significant, and growing, demand for numbers in California, which corroborated AT&T's general claim that the supply of available telephone numbers was being depleted. But this material also showed that area codes were being split, so new numbers were being

provided when they were needed. This fact weighed against the inference that actual, existing shortages of numbers (or well-founded projections of future shortages) required warm line service to be restricted on a permanent state-wide basis. (Decision at p. 18.)

Similarly, the Decision found that AT&T failed to explain why a report from the North American Numbering Plan Administrator ("NANPA") showed that technology and facilities did not permit AT&T to provide warm line service after 180 days or at any newly constructed residences. This report, the June 2006 Central Office Code Assignment Activity Report, is referred to here as the "2006 Activity Report." It stated that over two-thirds of California's area codes were "exhausted" or "in jeopardy[.]" (Decision at p. 18.) However, AT&T did not explain what the technical terms "exhausted" and "in jeopardy" meant in specific terms, i.e., why the existence of those conditions resulted in a lack of technology or facilities that did not permit AT&T to provide warm line service to the full extent required by the statute, or precluded it from providing service to subscribers of billed service. The Decision also noted that the 2006 Activity Report analyzed numbering issues on an area-code-by-area-code basis, and AT&T did not explain why state-wide policies were justified by numbering concerns in a specific group of area codes that were "exhausted" or in "jeopardy."[12] (*Ibid.*)

The Decision also analyzed two documents in the record authored by AT&T. We found an internal document produced by AT&T in 1997 not to be persuasive, because it merely stated that "telephone numbers *could* be depleted" (emphasis added), but did not provide any specifics on the unavailability of numbers, or state when, or even how quickly, any depletion of numbers would, in fact, occur. (Decision at p. 19. citing Exhibit 1, Attachment TLM-9.) We found another document, a

[12] We contrasted the material in the June 2006 Central Office Code Assignment Activity Report with another NANPA report introduced by UCAN, the 2006 NRUF and NPA Exhaust Analysis ("2006 NRUF Analysis"). UCAN asserted this report placed AT&T's claims in context. The 2006 NRUF Analysis showed that NANPA also projected when numbering shortages in California area codes would occur, and that in most area codes NANPA was not projecting an imminent shortage. As a result we found that state-wide warm line policies "are not rationally related to [their] stated purpose of proactively managing numbering resources to avoid shortages." (Decision at p. 20.)

letter sent to Commission staff on March 2, 1998 ("March 1998 Letter"), to be similarly unpersuasive. (See Exhibit 5, Attachment MJ-8.) The letter suggested that AT&T maintained a separate pool of numbers "assigned specifically to QDT" to provide warm line service, which did not support AT&T's claim that concerns about the overall supply of numbers required it to adopt its warm line policy.[13] We also found that the March 1998 Letter suggested that AT&T's warm line policy was developed as a cost-saving measure, and that AT&T held the mistaken view that section 2883's requirements were "interim[.]" (Decision at p. 43.)

2. The Decision Appropriately Considered the Date of Documents When it Weighed the Evidence.

The rehearing application alleges that the Decision "was arbitrary and capricious in rejecting AT&T's evidence of number shortages on the ground such evidence was dated…." (Rehg. App. at p. 17.) The rehearing application contends that its internal 1997 document and FCC material from 1999 are relevant because they describe numbering issues during the time period covered by UCAN's complaint. This claim misunderstands how the Decision evaluated this material from the record. As discussed above, the Decision did not simply rely on the age of AT&T's material when it found that AT&T failed to show that numbering concerns produced the conditions that would allow the company to avoid complying with section 2883's requirements.

The Decision only looked to the age of AT&T's material as a factor that indicated what weight this material should be given. Specifically, we found that the FCC order relied upon by AT&T was issued in 1999 and stated concerns about the speed with which area codes were running out of numbers in 1999, but that the FCC subsequently had adopted measures to deal with these concerns. The Decision further found that "AT&T provides no more recent information on how successful, if at all, these remedial measures proved to be." (Decision at p. 19.) Thus we determined that the FCC material was not persuasive because it did not show that actual number shortages had created

[13] "QDT" refers to "quick dial tone" which is a synonym for warm line service. (See fn. 2, above.)

"existing" limitations on technology or facilities at any specific point during the time period covered by the complaint.

Similarly, the Decision noted that the statement that "telephone numbers could be depleted" in an internal AT&T document written in 1997 did not give an indication (in quantitative terms) of how serious this concern was, or when any depletion would occur. (Decision at p. 19.) It was not simply the 1997 date of AT&T's internal document that caused us to find the material unpersuasive, it was the fact that the document raised only general concerns about the future and no more recent material was provided to show that those concerns in fact did arise, or that at some point those concerns were expected to rise to the level of an "existing" limitation on technology or facilities. In fact, AT&T's reliance on a single 1997 internal document that states only generic concerns about numbering—without linking those concerns to "existing" (or legitimately projected) limitations in technology or facilities—supports the inference that AT&T's warm line policy was not adopted in good faith. (See below at pp. 58-59.)

The rehearing application also asserts that the Decision improperly failed to take account of the time frame of a report it analyzed, the 2006 NRUF and NPA Exhaust Analysis ("2006 NRUF Analysis"). That report is contained in Exhibit A to UCAN's Request for Judicial Notice of Report, September 15, 2006, and uses data on the availability of telephone numbers to predict a range of times when area codes would "exhaust." This range spanned from the fourth quarter of 2008 to the second quarter of 2025, with the Los Angeles 310 area code being exhausted at that time. (Decision at p. 20.). The rehearing application claims the Decision improperly relied on this information because it was forward looking and not relevant to the time period covered by the complaint. (Rehg. App. at p. 18.)

The rehearing application's claims do not correctly describe the role the 2006 NRUF Analysis played in our analysis of the record. When we made holdings based on the 2006 NRUF Analysis we relied on the *nature* of the analysis contained in that document, and the fact that the 2006 NRUF Analysis was inconsistent with the inferences that AT&T sought to derive from the 2006 Activity Report, which was

authored by the NANPA, the same body that produced the 2006 NRUF Analysis. Specifically, we looked at the type of information the NANPA produced to support our finding that numbering shortages were area-code specific, and that different area codes had significantly different amounts of numbers available for assignment.[14] (Decision at p. 20.) We further noted that UCAN had provided this material for the purpose of rebutting AT&T's claim that other material produced by the NANPA showed that numbering shortages were pervasive in California. (Compare Decision at p. 18 (20 of 27 area codes exhausted or in jeopardy) with Decision at p. 20 (most area codes do not face imminent exhaustion).) We concluded that this rebuttal of the conclusions AT&T drew from the 2006 Activity report was successful.

Thus the rehearing application is incorrect to claim that the Decision committed error when it considered the 2006 NRUF Analysis, which AT&T asserts "says absolutely nothing about number availability" during the time frame of the complaint.[15]

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[14] We held that a decision not to provide the statutorily-required warm line service "would have to be closely tailored to the risk of exhaustion in [an] area code." (Decision at p. 20.) By comparing the 2006 NRUF Analysis and the 2006 Activity Report we were able to see that AT&T had not show this correlation existed between its policies and the material it relied upon.

[15] The rehearing application uses the claim that the Decision dismissed AT&T's material solely because of its age to reiterate its view of the evidence on numbering issues. The rehearing application first restates some of the findings made in AT&T's 1997 internal document: that placing a time limit on warm line service could prevent "new install QDT (IQDT) service order fallouts due to lack of telephone numbers[,]" and that a time limit would "provide temporary relief of QDT telephone number shortages…." (Rehg. App. at pp. 16, 17.) AT&T asserts that these quotations "prove[]" that the 180-day time limit on warm line service "reasonably related to providing relief for number shortages…." (Ibid.) However, this assertion does not address the factors the Decision considered when it analyzed this document, such as the fact that the document addresses generic, not specific concerns and no further information was available to show if the concerns expressed in 1997 ever developed into a situation where "existing technology and facilities" did not permit AT&T to offer warm line service. The rehearing application further argues that under FCC regulations, numbers used to provide warm line service are categorized as "Administrative" and a "requirement to have a large number of Administrative numbers penalizes a service provider" by making it more difficult to obtain more numbers. (Rehg. App. at p. 18.) Notably, the rehearing application does not claim the FCC's rules create a technological or facilities-based impediment that does not permit AT&T to provide warm line service. Further, evidence in the record indicates that this concern may be exaggerated and could, in any event, be resoled by administrative action at the FCC. UCAN's witness states, at page 6 of Exhibit 1:

> Not only is the percentage of warm line numbers very small relative to the total universe of numbers, but this concern could be better addressed by seeking that the FCC change its classification of warm line

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The Decision places much less emphasis on the time period addressed by materials in the record than AT&T claims. To make this clear we will modify the Decision so it relies on the 2006 NRUF Analysis' projection that most California area codes would not begin to exhaust their supply of available numbers in the near term for the purpose that UCAN requested: to show that AT&T's position does not necessarily reflect the views of the NANPA.

3. The Decision Did Not Mistake the Significance of the Commission's Own Numbering Decisions or of the Two NANPA Reports in the Record.

The rehearing application's next claim refers to fourteen Commission decisions implementing area code splits or overlays. AT&T asserts the Commission was "arbitrary and capricious… to have ordered all of these area code splits and the recent overlay because of the shortage of available numbers and then conclude that there is no constraint caused by limited number resources." (Rehg. App. at p. 20.)

This claim, too, mischaracterizes the Decision's findings. The Decision states, at pages 20-21:

> Blanket, statewide policies of 180-day termination and failing to connect new residential units constitute arbitrary measures that bear no reasonable relationship to actual numbering projections in specific area codes....

This does not amount to a finding that there is "no constraint caused by limited number resources." (Rehg. App. at p. 20.) As discussed above, the Decision's findings are based on AT&T's inability to demonstrate, using the material in the record, that numbering shortages limited the "extent" to which its "technology or facilities" allowed it to provide warm line service or that numbering shortages "preclude[d]" it from providing service to subscribers of billed service. (Cf., Pub. Util. Code, § 2883, subd. (a).)

The rehearing application also claims that the Decision's analysis of the 2006 Activity Report and the 2006 NRUF Analysis was inconsistent. According to

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> numbers—a change that the North American Numbering Council… has already recommended.

AT&T, the Decision "relied on the 2006 NRUF Report but rejects the evidence in the 2006 [Activity] Report." (Rehg. App. at p. 21.) AT&T asserts that this amounts to legal error because it is "arbitrary" to rely on one of these documents and not the other. (*Ibid.*) As explained above, we considered both reports and concluded that the existence of the 2006 NRUF Analysis showed that little weight should be placed on the inferences AT&T derived from the 2006 Activity Report because those inferences did not necessarily reflect the position of the NANPA. (Decision at p. 18.) This was a considered analysis and it was explained in the Decision; it does not represent "arbitrary" action.

Similarly, when we concluded that AT&T had failed to show why the situation described in the 2006 Activity Report affected the "extent" to which its "facilities or technology" allowed it to offer warm line service (or precluded it from providing billed service), we did not arbitrarily avoid considering the 2006 Activity Report.[16] Instead, we found that AT&T failed to show how the information in that report was germane to the issue at hand. The rehearing application provides no authority for the proposition that it is legal error for us to reach this conclusion.

The rehearing application is also incorrect when it claims the Decision placed too much weight on the 2006 NRUF Analysis.[17] As explained above, the Decision found that the 2006 NRUF Analysis showed that data about numbering shortages could be used to develop well-founded projections about when a specific area code might run out of numbers, and showed that the claims AT&T was making about the severity of numbering shortages based on the 2006 Activity Report were not entitled to

[16] The rehearing application further asserts that the Decision is in error for stating that AT&T did not explain the significance of the terms "in jeopardy" or "exhaust" because AT&T had supplied information allowing the Commission to understand the technical meaning of those two terms. (Rehg. App. at p. 20.) However the Decision was not seeking to understand what these terms meant in the abstract—it was seeking to understand why the situation they described did not permit AT&T to offer the warm line service otherwise required by the statute.

[17] The rehearing application also criticizes the Decision for considering the 2006 NRUF Report in the first place. AT&T claims that the report was submitted when reply briefs were filed, and therefore it was "legal error to base a decision against AT&T on this issue based on a single document…." (Rehg. App. at p. 21.) This criticism mischaracterizes the Decision, which was not "based on a single document...." This claim also misses the point: the 2006 NRUF Report was submitted as a response to the claims made by AT&T, and AT&T did not object to its being included in the record. (See below at pp. 52, 54-55.)

great weight. The information contained in the 2006 NRUF Report was, therefore, not "irrelevant to this proceeding" as the rehearing application claims. (Rehg. App. at p. 22.)

The rehearing application's other contentions about the 2006 NRUF Report either seek to re-argue the evidence, or make semantic claims. The rehearing application discusses the 951 area code which was established in 2003. According to AT&T, the fact that an area code split occurred in 2003 demonstrates that numbering shortages existed during the period covered by the complaint. (*Ibid.*) Yet the Decision clearly explained that inconclusive[18] arguments based on generic facts such as this were not sufficient to demonstrate that AT&T's network precluded it from providing warm line service as otherwise required by section 2883.

The rehearing application also asserts that the Decision unfairly disagreed with AT&T's evaluation of the 2006 Activity Report because of a lack of "foundation," but did not require UCAN to provide any "foundation" for the 2006 NRUF Report. This claim misunderstands the point the Decision made: AT&T showed that some area codes faced "exhaust" or were "in jeopardy," but did not explain how those conditions precluded it from providing service to subscribers or billed service, or why those conditions limited the extent to which it could provide warm line service. However, the technical term "foundation" is not helpful to the Decision's discussion, and we will modify the Decision to clarify this point.

Additionally, the rehearing application asserts that we engaged in plagiarism because the Decision adopted UCAN's analysis without citation to UCAN's pleadings. AT&T asserts this lack of citation is an attempt to make the Decision's description of the report "an independent analysis, when in fact it is copied from the reply

[18] As discussed above, the fact that an area code was split in 2003 can be used to support many different inferences. Once inference that can be drawn is that after 2003 there was no shortage of numbers in either the old area code or in the new area code that was adopted as a result of the split. Another inference that can be drawn is that while numbering shortages developed at some point prior to 2003, a period of time existed before those numbering concerns became serious. As a result, the fact that an area code was split in 2003 does not readily support the inference that AT&T was subject to state-wide limitations on its facilities or its ability to provide service to subscribers of billed service during the entire period covered by this complaint, from May 1997 to August 2006.

brief." (Rehg. App. at p. 21.) This contention is unhelpful. Our decisions often adopt the analysis prepared by parties when they find it to be convincing. However, since this issue is of concern to AT&T, we clarify this language.

The rehearing application also incorrectly claims that the Decision copied inaccurate information from UCAN. The Decision stated that that "most area codes hav[e] five to nine years before projected exhaustion." (Decision at p. 20.) This statement is too concise, but it does not misrepresent the underlying data. The information in the 2006 NRUF Report can be used to place area codes into three categories: those projected to exhaust in four years or less, those projected to exhaust in five to nine years, and those projected to exhaust in ten years or more. The largest category was the five-to-nine-year category. A smaller number of area codes fell into the less-than-five-year category and the ten-year-plus category. The rehearing application asserts that the Decision is inaccurate because only 38% of area codes fell into the five-to-nine-year category and 38% is not "most." (Rehg. App. at pp. 20-21.) We believe our modifications of this language will address AT&T's concerns, but this semantic claim is not constructive. The Decision's main point is correct: UCAN showed that AT&T's claim that numbering resources were scarce in 20 of 27 area codes did not necessarily reflect the position of the NANPA. (Decision at p. 20.)

4. The Decision Properly Evaluated The Claims Made in AT&T's Appeal of the POD.

The rehearing application next asserts that the Decision's discussion of AT&T's appeal of the POD's findings on numbering questions is in error for three reasons. First, AT&T asserts that the Decision's discussion of the March 1998 Letter did not address the claims AT&T sought to make when it relied on that letter. The March 1998 Letter had been written because Commission staff were seeking to understand why the carrier gave a new number to residences when it provided warm line service after a disconnection. The March 1998 Letter gave a general description of how numbers were assigned to warm line service. It stated that AT&T used numbers "assigned specifically to QDT" to provide warm line service so it did not have to "re-process or recondition the

pre-existing telephone number...." (Exhibit 1, Attachment TLM-9, Exhibit 5, Attachment MJ-8.) It further stated that a new automated process would—for the first time—allow AT&T to easily and cheaply terminate warm line service after it had been in place for a period of time, and place the numbers from the terminated warm line service back in a pool, to be re-used. The March 1998 Letter stated this process would provide cost savings and that the purpose of warm line service was to provide "an interim method to access emergency services." (*Ibid.*)

The rehearing application asserts that the March 1998 Letter was significant because it showed that AT&T had acted "reasonably and forthrightly with the Commission" and this conduct was "relevant when considering whether a penalty is an appropriate sanction." (Rehg. App. at p. 23.) However, it was not error for us to reach a different conclusion. We considered all the arguments made concerning the March 1998 Letter and explained our view of the letter's significance.[19] We noted that the March 1998 Letter stated AT&T was only required to provide "interim" warm line service—giving the impression that AT&T's practices complied with section 2883. (Decision at pp. 42-44.) Additionally, our staff's concern was not the requirements of section 2883: staff wanted to find out why the carrier changed the phone number at a residence when that residence began to receive warm line service. Thus, when considered as a whole, the record does not establish that the March 1998 Letter could have "informed Commission staff of its practice" as AT&T claims, or that AT&T acted "reasonably and forthrightly[.]" (Compare Rehg. App. at p. 22.)

We also directly disagreed with AT&T's underlying claim—that the March 1998 Letter was relevant to the question of whether AT&T should be penalized. We held: "AT&T has not shown how staff's knowledge of the carrier's practice can be construed as the Commission's own intent to approve of the practice and, accordingly, curtail its regulatory role." (Decision at p. 42.) And we further specifically rejected "the

[19] Because UCAN had no opportunity to discover related documents, UCAN had asked the Commission to give the letter little weight. (Response to Appeal of POD, December 3, 2007, at p. 19.)

argument that, by communicating the 180-day disconnect policy to Commission staff, the policy thereby became anointed as reasonable." (Decision at p. 43.) Thus the question of the significance of the March 1998 letter is not material, because it does not effect the Decision's ultimate conclusion on this topic.

Second, the rehearing application asserts the fact that numerous area codes, across the state, were split in response to numbering concerns was sufficient to establish that "numbering shortages were statewide." (Rehg. App. at p. 23.) Again, this is a claim about the weight of the evidence and does not demonstrate legal error. In this case, the record shows that to the extent that numbering shortages existed they were transitory (i.e., they were ultimately resolved by splitting area codes) and localized (i.e., they were specific to particular area codes). There is no reason why it is legal error for us to infer from this record that a California-wide numbering shortage did not exist during the period covered by this complaint. The rehearing application's attempt to aggregate all of the numbering shortages that developed and were resolved during the complaint period into a single "statewide" numbering shortage is an interpretation of the record that we declined to adopt. It is not legal error for us to evaluate the record and make findings different from the findings advanced by AT&T. And in this case, the Decision's findings represent the better view of the evidence: there was a disparity between AT&T's blanket state-wide policy of curtailing warm line service and the transitory and localized numbering shortages AT&T claimed were the cause of that policy.

Third, the rehearing application argues that the Decision erred in finding a statutory violation based on the fact that AT&T did not tailor its policy to the number supply in individual area codes. The rehearing application claims that in order to reach this conclusion there must be "evidence in the record" showing that "such tailoring was possible." (Rehg. App. at p. 23.) This claim does not take into account what the evidence did show: that AT&T adopted a blanket, statewide policy to restrict warm line service in response to alleged, unverified concerns about the effect of transitory, geographically discreet numbering concerns—in the face of a statute requiring AT&T to provide warm

line service "to the extent" permitted by AT&T's technology and facilities.[20] (Pub. Util. Code, § 2883, subd. (a).) No material in the record specifically shows that AT&T considered the possibility of adopting a more focused or limited warm line policy. Rather, it appears that AT&T's policy was either adopted to address simply what "could" happen (without an attempt to specifically identify how numbering would affect AT&T's ability to provide service), or because new technology allowed AT&T to curtain warm line service for the first time and the company wanted to take advantage of the associated cost savings. (Exhibit 1, Attachment TLM-9; Exhibit 5, Attachment MJ-8.)

D. The Decision Correctly Concluded That AT&T Improperly Provided Either No Notice Or Inaccurate Notice of its Warm Line Service.

After addressing AT&T's obligations under section 2883, subdivision (a), we considered UCAN's allegation that AT&T had failed to provide notice of its warm line service, as required by law. Section 2883, subdivision (c) requires that subscribers of local exchange service be informed about the existence of the warm line service mandated by subdivision (a). The statute states that we are to establish the manner in which carriers provide this notice information, and that we are to require the carriers to provide notice. (Pub. Util. Code, § 2883, subd. (c).) UCAN also asserted that carriers are subject to a basic minimum requirement to provide sufficient information about the services they provide, so that consumers can make informed decisions when choosing whether or not to obtain certain services or when choosing between services.

AT&T contended that it was not responsible for meeting subdivision (c)'s requirements because we had not yet required a notice to be provided. (AT&T's Opening Brief of AT&T at p. 14.) Subsequently, AT&T also asserted that its tariffs provided adequate notice of its warm line policies. (Appeal of POD, November 9, 2006, at p. 22.)

[20] Moreover, the Decision made AT&T responsible for developing the record on this issue, in part because "most of the information necessary to make such a showing [i.e., that its facilities did not allow it to provide warm line service] is uniquely within AT&T's possession." Thus the fact that AT&T did not explain in any detail what its capabilities were with regard to warm line service—either in terms of the limitations it was actually facing or in terms of its ability to devise a tailored solution—does not prevent the Decision from reaching a conclusion on this issue

UCAN asserted that Commission precedent establishes that tariffs are not sufficient to provide the notice to customers, and that AT&T's claims were contradicted by its prior conduct which assumed that it could notify customers about warm line service without direct supervision from the Commission. (Response to Appeal of POD, December 3, 20007, at pp. 17-18.)

The Decision addressed the positions of the parties, and resolved this issue by relying on general principles relating to customer notice that we determined were most relevant here. The Decision explained that we had previously articulated notice requirements that bore directly on the question of what sort of notice AT&T was obligated to provide, and that these requirements had been enacted into law by the Legislature. At a minimum, carriers must give telephone customers enough information to allow those customers to make informed choices about the different types of service available to them. (Pub Util. Code, § 2896, subd. (a); *UCAN v. Pacific Bell* [D.01-09-058] (2001) __ Cal.P.U.C.3d __, at p. 17 (slip op.).)[21]

We explained in detail the general notice standards that we, and the Legislature, have made applicable to telephone utilities. Section 2896, subdivision (a) requires carriers to provide customers with information about their services, including "service options, pricing, and terms and conditions of service." This statute requires information to be provided so customers can make informed choices between different types of service and between carriers. In *UCAN v. Pacific Bell* [D.01-09-058], *supra*, we found that section 2896 had enacted into law an already-established "minimum regulatory standard" requiring companies such as AT&T "to provide consumers with the information necessary to make informed choices among services and service providers." Finally, we pointed out the importance of this requirement. "This minimum standard reflects traditional regulatory concerns for consumer protection and also emerging concerns about fair competition." (*Id.* at p. 17 (slip op.).)

[21] Commission decisions are available via the Commission's web site. *UCAN v. Pacific Bell* [D.01-09-058], *supra*, is available at <http://docs.cpuc.ca.gov/WORD_PDF/FINAL_DECISION/10184.PDF>.

Turning to the facts of this case, the Decision explained why customers needed accurate information about warm line service. For example, we pointed out that consumers in financial hardship and facing disconnection could only make an informed choice about which bills to pay if they received accurate information about warm line service. Similarly, those customers who were deciding whether or not to cancel land line service in favor of wireless or another service "should be able to readily obtain accurate information about the continuation of 911 services after termination." (Decision at p. 23.)

We concluded that, read in conjunction with section 2883, subdivision (c), the principles codified in section 2896, subdivision (a), made clear the minimum obligation for local exchange carriers regarding warm line service. Carriers must provide customers with sufficient information to make an informed choice, including information about "the availability of the services described in [section 2883] subdivision (a)." (Decision at p. 23; compare Pub. Util. Code, § 2896, subd. (a) with § 2883, subd. (c).) Because AT&T was under a minimum obligation that both this Commission and the Legislature had articulated, the fact that we had not separately reiterated what was required under section 2883, subdivision (c), did not prevent us from concluding that AT&T had contravened the notice requirements relating to warm line service. The Decision noted that under section 2883, subdivision (c) we were not responsible for establishing the actual information that would be provided to subscribers. We were only to determine the manner of notice that carriers would provide, and require that such notice be provided. As a result, lack of Commission action did not affect the basic requirement that carriers were under an obligation to follow. (Decision at p. 23.)

The Decision further found that the information provided by AT&T was not legally adequate. We examined the final Disconnection Notice that AT&T sent to customers whose service is being disconnected for nonpayment. That notice states that "service (except access to 911 service where facilities and operating conditions permit) will be permanently disconnected." (Decision at p. 22.) We also considered the fact that no notice about warm line service is given to subscribers who terminate service voluntarily, or to subscribers who maintain their service. Finally, we considered

provisions in AT&T's tariff that describe warm line service, and limit the offering with the qualifying statement that warm line service is "provided at no charge where facilities and operating conditions permit." (Decision at p. 24.)

We found that the information provided by AT&T: (i) failed to inform consumers of the availability of warm line service, and (ii) was incorrect. Without explicitly mentioning the lack of information provided to most customers, the Decision found that AT&T provided only parenthetical information to those being disconnected for failure to pay their bills, and that this information was inaccurate. The Decision held that this type and amount of information "fail[ed] to affirmatively provide accurate 911 emergency access information...." (Decision at p. 24.) The Decision also found that the information contained in AT&T's tariffs was inaccurate. The Decision noted that AT&T did not specify that it had placed time limits on warm line service in its tariff and that the restriction AT&T placed on warm line service ("where facilities and operating conditions permit[]") sought to expand AT&T's ability to limit warm line service beyond what the statute allowed. (Decision at p. 24.) However, the Decision did not explicitly evaluate whether or not AT&T's tariffs constituted notice of its warm line service.

The rehearing application asserts that this approach is in error for two reasons. First, it asserts that the Decision essentially concludes that AT&T contravened section 2896, subdivision (a), even though the complaint did not allege a violation of that statute. According to AT&T, constitutional principles of due process prevent the Commission from concluding that AT&T had contravened section 2896, subdivision (a), unless UCAN specifically alleged a violation of this code section. (Rehg. App. at p. 25.) This claim does not accurately describe the Decision's holdings. The Decision found that we had articulated a basic minimum standard that applied to carriers, no matter what the circumstances, even though we had not established further, specific, requirements under section 2883, subdivision (c). We also found that the Legislature had codified this basic minimum standard in section 2896, subdivision (a). To the extent the rehearing asserts that principles of due process prevent us from considering the requirements of section

2896, subdivision (a), in this proceeding, those claims will be discussed below, at pages 67-68, with AT&T's other legal claims involving due process.

Second, the rehearing application claims the Decision did not properly support its conclusion that AT&T had failed to provide proper notice to its customers. AT&T begins this argument by claiming that the Decision improperly finds AT&T's notices to be inaccurate "without relying on any evidence from UCAN." (Rehg. App. at p. 25.) This claim, which is not accompanied by any analysis or authority, fails to demonstrate error. The Decision relied on the text of the notice AT&T sent by letter and on AT&T's tariff. These materials were properly made part of the record and the identity of the party that placed them in the record is not relevant, especially when there is no dispute as to their authenticity.[22] Moreover, as discussed above, UCAN's legal arguments on the requirements of the "minimum regulatory standard" for disclosure formed a part of the Decision's analysis of this issue.

The rehearing application next argues that its tariff "constitutes legal notice" of its warm line service because customers are bound by tariffs "notwithstanding their actual knowledge." (Rehg. App. at p. 26.) However, the internal logic of this assertion is flawed. The fact that customers are generally bound by a tariff provision "notwithstanding their actual knowledge[]" does not show that "tariffed information about warm dial tone constitutes" a legally sufficient notice to customers. (Rehg. App. at p. 26.) Specifically, the question here is whether AT&T gave its subscribers enough information about warm line service to allow those subscribers to make informed choices about their service. The fact that tariffs are binding "notwithstanding" a customer's actual knowledge does not support the conclusion that customers had the information they needed to make informed choices. Indeed, the rehearing application only describes

[22] The rehearing application also claims that this portion of the Decision is in error because it "was not supported by any citations to the record." (Rehg. App. at p. 27.) The Decision quotes from AT&T's materials, and identifies the sources of its quotations. (Decision at pp. 22 (fn. 31), 24 (fn. 33).) The rehearing application states no reason why the lack of additional citation results in legal error.

the notice given as "legal notice[,]" effectively admitting that no *actual* notice was provided. (Rehg. App. at p. 26.)

Third, the rehearing application argues that we failed to take into account certain facts when we found that AT&T's disconnection notice did not provide customers with the "basic minimum of statutory information" about warm line service. We found that AT&T provided no notice of its warm line policy unless a customer was being disconnected for failure to pay. Further, we found that the notice provided under those circumstances was not clear, and, moreover was inaccurate, because it did not describe the 180-day limit AT&T placed on warm line service. (Decision at p. 24.) The rehearing application challenges the claim that its disconnection notice was inaccurate. According to AT&T, it would have been incorrect for a notice to state that warm line service was available for only 180 days, because "some customers could have warm dial tone for less than or longer than 180 days." (Rehg. App. at p. 26.)

This contention does not have merit. The notice AT&T provided was inaccurate because it failed to state that warm line service would be provided only for a limited period of time—not because it failed to indicate the precise length of that time. The statement that warm line service would be provided "where facilities and operating conditions permit" does not convey the idea that in each and every case AT&T would provide access to 911 service only for approximately six months before the service would be disconnected. (See Decision at p. 22.) For example, the language of AT&T's notice can easily be read to imply that warm line service could be interrupted, and then resume again once "conditions permit[.]" Similarly, the notice could be read to imply that some warm line service could be affected by "facilities and operating conditions" while other service would not be affected. In addition, the rehearing application's claim does not contend with the fact that AT&T provided no information about the availability of warm line service to customers who disconnected voluntarily. In that case, there was no question that AT&T failed to inform customers of the availability of warm line service.

Additionally, while AT&T claims that the phrase "where facilities and operating conditions permit" essentially tracks the statute, this language, in fact,

reinterprets the statute's requirements—and does so incorrectly. (Compare, Rehg. App. at p. 27, Decision at p. 24.) The statute requires AT&T to provide warm line service "to the extent" that "existing technology and facilities" allow. AT&T did not copy this language into its notice but instead stated a less stringent requirement ("where" instead of "to the extent that") that gave the company more opportunities to restrict warm line service than the statute does (excluding "existing" and including "operating facilities"). As a result, AT&T's notice discloses to customers neither what the statute requires AT&T to do nor what service AT&T actually provided. Given these defects in AT&T's discontinuation notice, the Decision correctly found that the notice did not inform customers of the service options that were available to them. Disputes about the specific length of time that elapses before warm line service is terminated are not material to this finding.[23]

AT&T similarly contends that the Decision improperly found that the company's tariff was inaccurate. The rehearing application contends that the condition in its tariff "where faculties and operating conditions permit" is very similar to section 2883, subdivision (a)'s language stating warm line service is to be provided "to the extent facilities and conditions permit…." (Rehg. App. at p. 27.) As discussed above, however, the statute allows carriers to restrict warm line service only under limited conditions while AT&T's tariff language gives the carrier almost unfettered discretion to restrict warm line service, especially because it includes "operating conditions" as one of the reasons why such service would be restricted.

The rehearing application also asserts that the Decision does not have a sufficient basis for its conclusion that AT&T's conduct amounted to willful misconduct.

[23] AT&T also claims that the Decision erroneously ruled against AT&T because AT&T "did not include all the information the Commission may *now* want in the notice, but failed to communicate to the carriers." (Rehg. App. at p. 26, fn. 97.) However, this claim misunderstands the Decision's findings. The Decision does not establish a disclosure requirement and then find that AT&T failed to meet that newly created requirement. Rather, as discussed in the main text, above, the Decision finds that AT&T failed to meet the minimum statutory standard applicable in all cases to all telephone utilities: correctly describing to customers what service it was providing. (Cf., Pub. Util. Code, § 2896, subd. (a).)

As discussed below at pages 58-59, this language will be modified and this claim need not be addressed. We will further modify the Decision to more clearly describe the relationship between the basics minimum notice requirement that we, and the Legislature, have imposed on carriers and the specific requirements of section 2883, subdivision (c), since the rehearing application, in places, suggests this discussion is not sufficiently clear.

III. THE LEGAL THEORIES AND PRINCIPLES OUTLINED IN THE REHEARING APPLICATION DO NOT PREVENT THE COMMISSION FROM ASSESSING A PENALTY, AND THE DECISION WILL BE MODIFIED TO MAKE THIS CLEAR

A. Introduction: The Commission is the Fact-Finder.

In addition to asserting that the Decision failed to appreciate the significance of AT&T's evidence, the rehearing application also claims that the Decision incorrectly applied certain legal principles. According to AT&T, these principles require the Commission to find in AT&T's favor. For example, AT&T claims that the rules of evidence used in court proceedings require the testimony of UCAN's witness Murray to be stricken from the record. Because the rehearing application further claims that "there is *no other evidence* in the record to support UCAN's claimed violations of [section] 2883[,]" AT&T contends that we must find that the record does not support UCAN's complaint. (Cf., Rehg. App. at p. 6.) By further way of example, AT&T claims that the statutes of limitation governing civil court proceedings prevent us from assessing a penalty in this case. (Rehg. App. at pp. 35-36.)

These claims will be discussed individually, below. However, when considered together, the rehearing application's legal claims show that AT&T fails to understand our role as the decisionmaker and fact-finder in this dispute. In fact, the rehearing application contends, at pages 10-11, that this Commission is legally precluded from exercising judgment in reviewing the record, and in determining what analytic methods it will use to resolve this case. Similarly, the rehearing application asserts that we "cannot … reject the testimony of AT&T's network engineers supported by written documentation of its practices over a decade." (Rehg. App. at p. 41.)

The law does not contain these limitations on the Public Utilities Commission's authority. In this case, we, and the Presiding Officer, did what the law does require. We weighed the evidence and the differing contentions of the parties. Then we made factual findings and reached legal conclusions. All of this was properly explained. The Decision explicitly describes the analytic framework it used to evaluate the issues presented; and the Decision makes it clear how the evidence and the legal arguments of the parties were considered in reaching its conclusions. (E.g., Decision at pp. 5 (issues presented), 6 (relationship of numbering concerns to section 2883), 12 & 15 (evidence on telephone connection), 18 (evidence on numbering concerns).)

By explaining its approach and relying on the record, the Decision followed a legal and proper method to reach the ultimate conclusion that AT&T should be penalized. In *Modifying D.07-07-013 and Denying Rehearing* [D.08-04-043] (2007) __ Cal.P.U.C.3d __, we specifically rejected the theory that claims relying on only one party's view of the evidence, asserting that the law required the evidence to be interpreted in a certain way, or contending that the law barred the Commission from making findings adverse to one party can establish that a decision in a complaint case is in error. That decision explained, at page 4 (footnote omitted), that the Commission is the fact-finder in a complaint case. As a result, we are:

> charged with the responsibility to undertake a "reasoned analysis" and to explain "the principles [we] relied upon…." (*Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1965) 62 Cal.2d 634, 648[;] *Greyhound Lines v. Public Utilities Com.* (1967) 65 Cal.2d 811, 813.) When we properly explain the basis of our holdings—and those holdings are supported by the record—there is "a strong presumption in the correctness of the findings and conclusions of the [C]ommission…." (*Pacific Tel. & Tel. Co. v. Public Utilities Com.*, *supra,* at p. 648.)

Similarly, claims challenging the method of analysis we have chosen—or determinations we have made about the weight of the evidence—fail to demonstrate error. This is especially true of allegations that rely on provisions of the Evidence Code, or the Code of Civil Procedure, which govern trials in the civil courts. Section 1701,

subdivision (a) clearly states that our proceedings are to be conducted according to the rules set forth in our Rules of Practice and Procedure and in the Public Utilities Code. The statute further provides:

> No informality in any … proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved or confirmed by the [C]ommission.

Thus, as a general rule, claims that the Decision must make findings favorable to AT&T because it is precluded from considering certain evidence, or must analyze the record in the particular way described in evidentiary principles advanced by AT&T, do not demonstrate that the Decision is in error. The law requires, instead, that the Commission undertake a reasoned analysis, explain why it chose the principles it did rely upon, and base its decision upon the record.[24] As discussed below in detail, the Commission did so here, and claims asserting that the Commission should have used different methods to analyze the issues in this case, or viewed the record in a light more favorable to AT&T, do not demonstrate error.

B. The Decision Properly Required AT&T to Prove Its Claim that Numbering Concerns Required It to Adopt a Policy of Limiting and Not Providing Warm Line Service.

As discussed above, AT&T replied to UCAN's allegation that its warm line policies were illegal by claiming that the statute allowed it to limit warm line service in response to a shortage of telephone numbers. AT&T took the position that the law required the Commission to deny UCAN's complaint unless UCAN made an affirmative showing, based on a preponderance of the evidence, that AT&T's existing technology and facilities allowed it to provide warm line service indefinitely rather than terminating service after approximately 180 days. (AT&T's Opening Brief at p. 6.) AT&T asserted that it "must prevail" if its evidence "cast[] doubt" on UCAN's position. (*Ibid.*) On the

[24] In the Decision, as in many complaint case decisions, we considered principles set out in the Evidence Code, and cases and other materials that elaborate on those principles. However, as the Decision makes clear, we looked to these legal resources for "appropriate guidance" in determining how to evaluate the record; we did not rely on these materials as controlling. (Decision at p. 7.)

other hand, UCAN asserted that, under normal Commission practice, once it had shown that AT&T was not complying with section 2883 the burden of proof shifted to AT&T to answer UCAN's contentions and show that its conduct was, in fact, permitted by the statute.[25] (UCAN's Opening Brief at p. 11.)

We determined to analyze the questions presented in this case by applying a two-part analysis. In the first part of the analysis, the Decision considered section 2883's basic requirement—that warm line service must be provided. (Decision at p. 6.) The Decision then noted that the statute had not created a completely open-ended requirement. Warm line service was to be provided "to the extent permitted by existing technology or facilities," and it was not to be provided if "doing so would preclude providing service to subscribers" of billed telephone service. (Pub. Util. Code, § 2883, subds. (a), (e).) The Decision stated that we read these provisions together to create "an 'existing technology and facilities' exception" to the general rule that warm line service must be provided. (Decision at p. 6.)

The Decision then addressed AT&T's contention that, under this "existing technology and facilities exception," numbering concerns allowed it to implement its current warm line policy as an affirmative defense. We stated AT&T would be responsible for proving this defense, i.e., for demonstrating that it was "relieve[d] of liability" because facilities and technology did not exist to provide warm line service as the statute would otherwise require (or that doing so would preclude providing service to other subscribers). (Decision at p. 7.) The Decision explained that we chose to adopt this approach for two reasons. First, after considering principles of evidence that require parties to prove those facts that were essential to the positions they advanced, we determined it was proper to make AT&T responsible for proving the facts relating to claims it advanced regarding numbering shortages. Second, we held that it was "especially appropriate" for AT&T to prove these points as a defense because "most of

[25] Thus AT&T's claim that UCAN agrees with AT&T's contentions on the burden of proof are unavailing. (Rehg. App. at p. 4.)

the information necessary to make such a showing is uniquely in AT&T's possession." (Decision at p. 7.) In this connection, it is worth noting that AT&T's preferred approach to analyzing the record would have placed UCAN in the position of having to prove a negative—that no impediment prevented AT&T from providing warm line service.

The rehearing application contends this approach was error. First, the rehearing application claims that the Decision is incorrect to read section 2883 as containing a general rule and an exception. AT&T asserts that the Decision improperly reads the qualifying phrase "to the extent permitted by existing technology and facilities" in section 2883, subdivision (a), to be a "provision that 'relieves AT&T of liability'[.]" Instead, AT&T contends that this language "*defines* the scope of liability[.]" (Rehg. App. at p. 3 (original emphasis).)

This claim does not accurately describe how the Decision interprets the statute. We held that two parts of the statute, subdivisions (a) and (e), together described what we called an "'existing technology and facilities' exception" to the general requirement that warm line service must be provided. (Decision at p. 6.) The language of subdivision (e) establishes that it was designed to create an exception from the general rule. Subdivision (e) is a stand-alone provision at the end of the statute that states:

> Nothing in this section shall require a local telephone corporation to provide "911" access pursuant to this section if doing so would preclude providing service to subscribers of residential telephone service.

We found that this exception was "essentially" repeated in the "existing technology and facilities" language in subdivision (a), and therefore determined to consider the question of whether a carrier was precluded from providing warm line service as a single issue. (Decision at p. 6.) The rehearing application's claim of error is based only on the contention that no exception appears in subdivision (a), and does not take into account that our approach relies on subdivision (e) as well. The rehearing application's discussion of *City of Brentwood v. Central Valley Regional Water Control Bd.* (2004) 123 Cal.App.4th 714 is misplaced for this same reason. The rehearing

application contrasts the language of section 2883, subdivision (a), with the language of the statute at issue in that case but does not take subdivision (e) into account.

Similarly, the rehearing application fails to demonstrate error when it asserts that the "descriptive nature test" set forth in *City of Brentwood v. Central Valley Regional Water Control Bd., supra,* at pages 725-726 prevents us from determining that section 2883 contains a general rule and an exception. (Rehg. App. at p. 4.) This test states (internal quotation marks and citations omitted):

> Whether an exception to liability is an element of an offence or an affirmative defense depends on whether the exception is so incorporated with, and becomes a part of the enactment as to constitute part of the definition of the offence.

While the rehearing application seeks to apply this test to section 2883, it does not take into account the language in subdivision (e). The separate provisions of subdivision (e) are not "so incorporated" with subdivision (a)'s requirement to provide warm line service that it has become a part of that requirement.

In addition, the rehearing application's claims fail to demonstrate error for general reasons. The rehearing application does not account for the fact that determining what falls within the scope of liability in section 2883 and what is an exception is a question of statutory interpretation. (*City of Brentwood v. Central Valley Regional Water Control Bd., supra,* at pp. 722-723.) The conclusion that 2883 subdivisions (a) and (e) contain an exception to the otherwise applicable warm line requirement based on limitations in technology and facilities was based on a reasonable (and complete) reading of the statute that effectuates its overall purpose, and is, as a result, legally proper. Further, the rehearing application gives no support for the claim that we are legally bound to apply technical rules, "the genesis" of which is criminal law, in this case. (Cf., *City of Brentwood v. Central Valley Regional Water Control Bd., supra,* at p. 726.) We resolved this case by analyzing the evidence in accordance with straightforward principles developed using the Evidence Code as guidance, and the Decision clearly explained its approach. The law does not require us, instead, to follow the "technical rules" set out in

City of Brentwood v. Central Valley Regional Water Control Bd., supra. (Pub. Util. Code, § 1701.)

Finally, as the Decision explains, the technical rules of evidence are not as stringent as the rehearing application claims. Those rules specifically allow a fact-finder to consider a variety of factors "concerning the appropriate allocation of the burden of proof…." (Decision at pp. 37-38.) Rules of evidence permit a fact-finder to "take account of numerous factors in determining whether it is appropriate to shift the burden of proof…. [T]he truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1190-1191.)[26]

The rehearing application also alleges, however, that the explanation of principles relating to the burden of proof at pages 36-39 of the Decision fails to follow the law, as articulated in *LaPadre v. Dept. of Water and Power* (1995) 27 Cal.2d 471 and in 1 Witkin California Evidence (4th ed. 2000) Evidence In Administrative Proceedings, section 61, page 66. The language AT&T relies upon in the Witkin treatise states only the general proposition that "the burden is on the party having the 'affirmative of the issue'[.]" (*Ibid.*) The Decision explained that it chose not to rely on this formulation of the rule because concepts relating to the "affirmative of the issue" were no longer current,

[26] The rehearing application is incorrect to assert that this approach is "a complete abandonment of Commission precedent and constitutes legal error" because the Decision does not refer prior Commission decisions. (Rehg. App. at p. 4.) The Decision's approach is derived from section 2883's requirements and facts particular to this case, such as the holding that "most of the information necessary to make such a showing [i.e, a showing about numbering concerns] is uniquely in AT&T's possession." (Decision at p. 7.) Further the decision relied upon by AT&T as establishing Commission precedent, *ARCO Products Company v. SFPP, L.P.* [D.98-08-033] (1998) 81 Cal.P.U.C.2d 573 is not authoritative. The Commission granted rehearing of that decision in *ARCO Product Company et al. v. SFPP, L.P.* [D.99-06-093] (1999) 1 Cal.P.U.C.3d 418. The decision granting rehearing held that fact-finders had discretion to allocate the burden of proof based on the particular facts of a case, citing some of the same authority that the Decision relied upon. (*Id.* at p. 424, quoting *Webster v. Trustees of Cal. State Univ.* (1993) 19 Cal.App.4th 1456, 1463, quoting Cal. Law Revision Com., 29B West's Ann. Evid. Code, foll. § 500 (1966 ed.), p. 431.) The decision granting rehearing also calls into question the standard of proof advanced by AT&T—that a defendant need only "cast doubt" on complainant's evidence in order to prevail. (AT&T Opening Brief at p. 2.) We stated that such a standard "exaggerate[s] the stringency of the burden Complainants must meet." (ARCO *Product Company et al. v. SFPP, L.P.* [D.99-06-093], *supra*, at p. 424.)

and instead chose to seek guidance from the standard contained in Evidence Code section 500. (Decision at p. 37.)

The rehearing application claims that it is error for the Decision to determine to be guided by the provisions of the Evidence Code rather than the portion of Witkin AT&T relies upon because Witkin is "a recognized legal treatise in California…" (Rehg. App. at p. 5.) AT&T further contends that the portion of Witkin it cites is particularly relevant because it discusses administrative proceedings. These claims fails to demonstrate error because the rehearing application cites no authority for the proposition that the Commission was required to follow a general description of the law contained in Witkin when other authority suggested a different approach.

Nevertheless, the Decision's explanation of its approach could have been clearer. It appears that part of AT&T's misunderstanding of the Decision's holdings is based on the fact that the Decision described an exemption based on section 2883, subdivision (e) using language contained in subdivision (a). The Decision's discussion of the burden of proof, at pages six to seven, and its description of the "existing technology and facilities" exception, on page six, should be modified to clarify the Decision's approach.

In addition, the description of what UCAN must prove under the evidentiary principles the Decision chose to adopt is quite limited—and appears to be inconsistent with the Decision's actual approach to evaluating the record. (Cf., Decision at p. 37.) The Decision concurs with UCAN's position that AT&T did not provide warm line service in a way that was allowed by the statute because it imposed time limits (for which the statute does not provide). Further, when the Decision weighed the evidence, its findings made it clear that we concurred with UCAN's claim that blanket, state-wide restrictions on warm line service bore little relationship to transitory numbering concerns that were limited to specific area codes. (Decision at p. 21.) In light of those contentions, we required AT&T to demonstrate a connection between the numbering

concerns it raised and the specific policy it adopted—and AT&T failed to do so because it only provided generic information that was equivocal.[27]

> Yet the Decision's discussion of the burden of proof states:
>
> > In our view, the substantive law of § 2883 requires a complainant to carry the burden of proof as to these key cause of action elements: (1) that the defendant is a local telephone corporation; (2) that existing and/or new residential telephone connections exist within defendant's service area; and (3) that one or more of the residential telephone connections do not have "911" emergency service. With this showing, it becomes the defendant's burden to establish a defense, such as the unavailability of existing technology or facilities.

This language may correctly describe what technical principles of evidence require, but it is not helpful to understanding our decision because it does not reflect the analysis we actually undertook. We will modify the Decision so it clearly reflects the analysis we conducted in this case.

In addition, it is important to note that the discussion of the burden of proof is, to a large extent, immaterial. This was not a close case that turned on fine points of the law of evidence. We do not believe that AT&T would have prevailed even under the extremely favorable standard it proposed. AT&T contended that all it needed to do to win this case was to "cast doubt" on UCAN's contentions, yet it failed to rebut UCAN's claims. AT&T's claims about numbering shortages did not show that there was any relationship between the concerns AT&T raised and the warm line policy it adopted. We found, at page 19 of the Decision, that:

> AT&T does not make a recent factual showing of actual or prospective number shortages or that its 180-day termination policy and policy of not connecting new residential units are properly calibrated in response to a shortage risk.

[27] The Decision also found that material in the record showed that AT&T's warm line policies were, at least in part, driven by cost concerns. (Decision at p. 43.) Specifically, this material shows that AT&T's policy may have been prompted by the development of new technology that, for the first time, made it economically feasible to terminate warm line service for groups of residents rather than on an individual basis. (Exhibit 5, Attachment MJ-8.)

As a result, AT&T's claims did not "cast doubt" on UCAN's contentions. In fact, as discussed in detail below, we found that the disparity between the justifications AT&T provided in support of its conduct and the statute's actual requirements was so great that it contributed to our conclusion that AT&T had not acted in good faith. Under these circumstances, the claim that the Decision's findings are the result of an erroneously applied burden of proof miss the point: AT&T clearly contravened the requirements adopted by the Legislature in section 2883, and should be penalized.

C. The Presiding Officer Followed Correct Principles of Law in Developing the Record.

1. The Law Does Not Require the Commission to Strike the Testimony of UCAN's Witness Murray.

UCAN filed prepared testimony from two witnesses in this proceeding: Michael Shames, UCAN's Executive Director, and Terry Murray, a telecommunications expert with an extensive background, who has participated in numerous complex regulatory proceedings before state commissions and the FCC. (Decision at p. 49.) AT&T moved to strike the testimony of both these witnesses. The motion made by AT&T with respect to Mr. Shames' testimony was, for the most part, granted: the opinions expressed in that testimony were deemed inadmissible, and the relevance of Mr. Shames testimony about the legislative history of section 2883 was called into serious question. (Ruling Following Final Prehearing Conference, August 15, 2006, at p. 4.)

The Presiding Officer carefully reviewed AT&T's motion with respect to Ms. Murray's testimony, but ultimately concluded that the testimony should be admitted into the record. AT&T had challenged Ms. Murray's testimony on the grounds that she was not qualified to offer expert opinion on matters relating to the physical structure of AT&T's network and the effect of "numbering availability" and "capacity constraints" on AT&T's network. (Ruling Following Final Prehearing Conference, August 15, 2006, at p. 5.) The Presiding Officer discussed Ms. Murray's testimony with counsel for UCAN and AT&T at the final prehearing conference and based his decision on material submitted describing Ms. Murray's qualifications. After comparing Ms. Murray's qualifications to the matters addressed in her testimony, the Presiding Officer concluded that "her special

knowledge, education and experience allow her to form an opinion on all subjects touched by her testimony." (Ruling Following Final Prehearing Conference, August 15, 2006, at p. 5.) The Presiding Officer further stated he could account for differing levels of expertise held by witnesses by giving each witnesses' testimony an appropriate weight based on that witnesses' qualifications.

AT&T claimed this approach was in error in its appeal of the Presiding Officer's decision. We denied AT&T's appeal on two grounds. First, we found that the Presiding Officer's ruling on this evidence did not appear to be erroneous, and that, consistent with California trial practice, we were reluctant to disturb an evidentiary ruling made by the primary fact-finder. (Decision at p. 41.) In support of this holding, the Decision pointed to the record, which showed that Ms. Murray, in addition to her qualifications as an economist, had experience in the specific areas of concern to AT&T. Previously, Ms. Murray worked on questions of telephone number capacity in other regulatory proceedings dealing with costs and with competition issues, and had developed expertise about the engineering and operation of the primary components of the telephone network over the course of her extensive career.

Second, we noted that in resolving this case the Presiding Officer had considered the testimony of both parties, analyzed these contentions in light of one another, and accorded the appropriate weight to the parties testimony based on their witnesses' expertise. (Decision at p. 49.) Thus the concerns AT&T had expressed about Ms. Murray's testimony had been addressed through the weighing of the evidence. With respect to the weighing of the evidence, the Decision's holdings also make clear that AT&T's appeal had rested on a faulty premise. AT&T appeared to believe that if the Commission made a finding adverse to AT&T, that finding would have to be "*based solely on Ms. Murray's Testimony.*" (Appeal Of Presiding Officer's Decision at p. 29 (original emphasis).) However, the Decision pointed out that it had made its determinations by relying on a variety of evidence from different sources. The Presiding Officer's decision relied on AT&T's "own admission[s]." The Presiding Officer further relied on the documents attached to Ms. Murray's testimony, in addition to the testimony

itself. Finally the Presiding Officer's decision considered and relied upon testimony from AT&T's witnesses when reaching its conclusions. (Decision at p. 50.)

The rehearing application again alleges that it was error for the Decision to consider Ms. Murray's testimony, "and the error was prejudicial to AT&T. Ms. Murray's testimony should have been excluded from evidence, and UCAN's case dismissed for a failure of proof." (Rehg. App. at p. 6.) This claim is based on the two points AT&T raised in its appeal of the Presiding Officer's decision. First, AT&T asserts that Ms. Murray cannot speak to network issues because those issues involve engineering questions. The rehearing application re-states AT&T's critique of Ms. Murray's ability to testify on these points: her testimony was not designed to address engineering questions, she had no engineering background, and that she did not perform her own independent study of AT&T's network. (Rehg. App. at pp. 7-8.)

These allegations do not demonstrate error because they do not take into account the fact that the Decision resolved this matter by considering UCAN's position, and the material UCAN submitted in support of its position, as well. The Decision found that the record showed Ms. Murray had, in the course of her work on cost and competition issues, developed sufficient expertise in the area of numbering capacity to allow her to provide the testimony she submitted in this proceeding. Similarly, the Decision found that materials submitted in support of Ms. Murray's qualifications showed that she had sufficient knowledge about the physical structure of the components of the telephone network to provide the testimony she submitted.[28] (Decision at p. 49.) Thus the rehearing application is incorrect to claim that the conclusion that Ms. Murray had the ability to form the opinions contained in her testimony was "without … elaboration" or that the Decision did not "tie the record evidence concerning Ms. Murray's education and experience to the subject areas" about which she testified. (Compare Rehg. App. at p. 9 with Decision at p. 49.)

[28] Notably, this case does not involve the entirety of AT&T's telephone network. The physical aspects of the network relevant to this case are those that connect a residence to AT&T's central office, not the more complex network connections that occur between the central office, AT&T's main network, and beyond.

The rehearing application also relies on case law stating the general proposition that an expert witness must have expertise in the particular subject matter about which that witness testifies. (Rehg. App. at p. 9.) This authority does not demonstrate that the Decision is in error. The rehearing application only states a general rule—without showing that the rule was not applied in this case. The Presiding Officer specifically reviewed Ms. Murray's credentials and compared those credentials with the statements made in her testimony before concluding that she had, in the words of Evidence Code section 801, subdivision (b), special knowledge, education and experience that allowed her to form an opinion on the issues addressed in her testimony. (Compare Rehg. App. at p. 9 with Decision at p. 49.) That determination was not made solely on the basis of Ms. Murray's overall credentials, as AT&T implies—it was made based on her specific experience with numbering issues and the specific types of knowledge she had garnered on that topic in the course of her work on telecommunications issues. (Decision at pp. 49-50.)

The second claim of error regarding Ms. Murray's qualifications also re-states the position AT&T took during litigation: because, in AT&T's view, Ms. Murray was not qualified to offer her testimony, the Commission was legally barred from making any findings adverse to AT&T. According to the rehearing application, "the Commission cannot premise a statutory violation and fine against AT&T in a complaint case by criticizing AT&T's testimony…." (Rehg. App. at p. 10.) That is, AT&T contends that factual findings adverse to AT&T only rest on a conclusion that AT&T's evidence failed to persuade the Commission. As an initial matter, this claim is factually incorrect. Ms. Murray's testimony itself was not the only evidence UCAN offered in support of its case. Ms. Murray's testimony was accompanied by documentary attachments, which the Decision relied upon (Decision at pp. 49-50), and UCAN further provided briefing containing legal argument on the main issues in this case, including how section 2883 applied to the specific facts at issue here. However, in explaining this point the Decision overemphasized the extent to which it relied on other material in addition to Ms. Murray's testimony, and it should be modified to more accurately describe its approach.

Further, we did not base our holdings merely on criticism of AT&T's position. We based our findings on our independent reading of the material AT&T submitted to support its contentions. For example, while AT&T contended that the large number of our decisions approving area code splits showed that numbering shortages required it to limit warm line service, we found that this same evidence also "suggests the ability and success of the regulatory process to provide needed numbers." (Decision at p. 18.) We further considered AT&T's own internal documents and found that they did not show that the company had designed its warm line policies so that service was provided "to the extent permitted by existing technology or facilities" as the statute requires. Rather, we found that AT&T's documents show that the company chose to terminate warm line service after 180 days because of a generic, and unproven, concern that numbering shortages "could" occur. (Decision at p. 19.)

If the rehearing application means to claim that we cannot base findings adverse to AT&T on evidence submitted by AT&T, the law does not support that contention. No authority requires us to adopt AT&T's view of its own evidence. Instead, this Commission is required to undertake a reasoned analysis, to consider all of the material evidence and contentions made on the record, and to properly explain its holdings. (*Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1965) 62 Cal.2d 634, 648; *Greyhound Lines v. Public Utilities Com.* (1967) 65 Cal.2d 811, 813.)

In this connection, the rehearing application incorrectly characterizes the Decision's weighing of the evidence as an improper attempt to "second guess AT&T engineers and operations personnel, who are responsible for keeping its network up and running." (Rehg. App. at p. 10.) We are, in fact, specifically charged with the task of weighing the evidence in a complaint case and determining which material is persuasive, and which is not. Simply using a pejorative term ("second guess") to describe the act of weighing the evidence does demonstrate that the Decision is in error. AT&T cites to no legal authority to support its claim that we cannot evaluate the contentions made by AT&T's engineers, in light of the entire record, and cannot conclude that those contentions are not persuasive.

2. Material Submitted with AT&T's Reply Brief Did Not Meet the Requirements For Official Notice.

The Application for Rehearing further asserts that the Decision erred because it did not reverse an evidentiary ruling. The Decision stated that we "do not lightly disturb the evidentiary rulings of the Presiding Officer in our proceedings." (Decision at p. 51.) This appears to be a sound policy, as a detailed examination of the background of this evidentiary dispute shows.

The evidentiary ruling in question struck the discussion of "Form 502 utilization data" from AT&T's Reply Brief. (Rehg. App. at pp. 36-39.) This ruling was based on extensive argument from the parties, contained in several sets of pleadings. The context for this dispute was the parties' stipulation that a trial type hearing need not be held in this case. Before briefs were filed, the parties and the Presiding Officer had determined what material would form the record in this case, based on a stipulation between the parties. The parties stipulated that an evidentiary hearing would not be necessary if this case were submitted and briefed on the materials that were admitted at the July 28, 2006 Prehearing Conference. (Prehearing Conference Transcript, vol. 3, at pp. 47-48.) The Form 502 utilization data was not part of this record, and when AT&T sought to present calculations based on the Form 502 utilization data in its Reply Brief, it requested that the Commission take official notice of this material. (AT&T Reply Brief at pp. 9 (fn. 31), 12 (fn. 41).)

The Form 502 utilization data consisted of "information generated by AT&T" that had been provided to FCC. (Ruling Resolving Pending Motions Re Record and Submission of Proceeding, December 6, 2006, ("Ruling Resolving Pending Motions") at p. 3.) This information was in the form of raw data, but AT&T asserted that calculations based on this data would be more accurate than the calculations UCAN relied upon in its Opening Brief. UCAN's calculations had been taken from a report issued by the FCC's Wireline Competition Bureau that aggregated information about the amount of telephone numbers available to all carriers. (UCAN Opening Brief at p. 40.)

According to AT&T, UCAN improperly relied on the Wireline Competition Bureau's calculations because they were not "AT&T-specific[.]" (AT&T Reply Brief at p. 9.)

UCAN objected to the calculations AT&T made using the Form 502 utilization data and moved to strike the portions of AT&T's Reply Brief that contained those calculations. UCAN's motion asserted that the Commission's Rules of Practice and Procedure required such calculations be submitted with a party's prepared testimony. According to UCAN, the Commission could not rely on these calculations because: (i) no witness had provided testimony explaining how they were made, (ii) such an explanation did not appear in AT&T's Reply Brief, and (iii) the methodology used to make these calculations had not been tested at a hearing. (UCAN's Motion to Strike References to Extra-Evidentiary Documents, September 22, 2006, at pp. 3-4, 6.)

UCAN further asserted that it would not have stipulated to forgo hearings if AT&T had sought to introduce the calculations it made based on the Form 502 utilization data into the record before the July 26, 2006 Prehearing Conference. (UCAN's Motion to Strike References to Extra-Evidentiary Documents, September 22, 2006, at p. 2.) UCAN contended that hearings were required to test AT&T's calculations because the method used to make those calculations was incorrect. UCAN claimed that AT&T's Reply Brief made arguments based on the results of "simple average" calculations (performed by AT&T's lawyers) when the nature of the Form 502 utilization data required that a "weighed average" be calculated instead. (UCAN's Motion to Strike References to Extra-Evidentiary Documents, September 22, 2006, at p. 6.)

AT&T responded to UCAN's motion to strike, and also filed a separate motion reiterating and expanding upon the request to have Commission take official notice of the Form 502 utilization data made in its Reply Brief. In its opposition to UCAN's motion to strike AT&T asserted that it was not required to submit this information with its prepared testimony, as UCAN had claimed, because it was a proper subject for official notice. According to AT&T, "parties routinely cite to reports, notices, pleadings, and decisions on file with the FCC in briefs without first identifying those materials in prepared testimony." (Response of AT&T to Motion to Strike, October 20,

2006, at p. 2.) AT&T supported its claim that the Form 502 utilization data was a proper subject of official notice by stating that it was "on file" with the FCC. (Response of AT&T to Motion to Strike, October 20, 2006, at p. 4.)

Finally, AT&T argued that the Form 502 utilization data was equivalent to the 2006 NRUF Analysis, for which UCAN had separately sought official notice. According to AT&T, these materials were equivalent because they had not been identified by the parties in their opening testimony and were being offered in response to positions advanced by the other party during the briefing phase. AT&T further claimed that both parties' submissions were similar because these materials were officially noticeable and contained data relating to the important question of numbering issues. (AT&T's Response to Motion to Strike, October 20, 2006, at p. 4.)

AT&T reiterated these points in its response to UCAN's motion for official notice of the 2006 NRUF Analysis. There AT&T claimed that "based on past practice, official notice is not necessary." (AT&T's Response to Motion for Judicial Notice, October 2, 2006, at p. 2.) According to AT&T, both UCAN and AT&T should have been allowed to cite to documents "on file" with government agencies without having to first request official notice. (AT&T's Response to Motion for Judicial Notice, October 2, 2006, at p. 3.) Although AT&T's pleadings are not explicit, it appears that AT&T was suggesting that the Presiding Officer compromise on the two outstanding motions for official notice and rule that both AT&T's material and UCAN's material should be noticed by the Commission.

The Presiding Officer did not take the approach subtly suggested by AT&T. He concluded that UCAN's material would be considered in rendering his decision because both parties had asserted that it met the requirements of official notice and AT&T had formally stated that it had no objection to this approach. (Ruling Resolving Pending Motions at p. 4.) However, the Presiding Officer found that the Form 502

utilization data did not meet the statutory requirements for official notice.[29] The ruling found that the Form 502 utilization data had been prepared by AT&T itself and submitted to the FCC, placing it in a category of material that does not qualify for judicial notice. *Stephens v. Superior Court* (1999) 75 Cal.App.4th 594, 607-608 and other cases cited by the ruling find that material prepared by private parties and then submitted to a government agency is not comparable to material produced by a governmental body, which is entitled to official notice. (Ruling Resolving Pending Motions at p. 3.)

In the Decision, we rejected AT&T's appeal of the Presiding Officer's ruling. The Decision pointed out the difference between the evidentiary status of the 2006 NRUF Analysis and calculations made by AT&T using Form 502 utilization data. One set of materials had been authored by a governmental body and offered for the Commission's consideration without objection from the other party. On the other hand, AT&T's calculations were made by AT&T, using its own data and the Commission's ability to rely on these calculations had been disputed.[30] (Decision at p. 50.)

The application for rehearing again claims that the determination not to consider calculations based on the Form 502 utilization data was improper. (Rehg. App. at p. 36.) The rehearing application first contends that the determination not to rely on the Form 502 utilization data was legally erroneous because the data "serves to contradict and undermine the contentions made by UCAN…." (Rehg. App. at p. 37.) The mere fact that AT&T believes this material is relevant, without more, does not establish that it is a proper subject for official notice. (Cf., *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 (compiling relevant law).) In addition, the relevance of the calculations AT&T made using the Form 502 utilization data was not established.

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[29] The Commission's Rules of Practice and Procedure provide that it may take official notice of "such matters as may be judicially noticed by the courts of the State of California." (Rules of Practice and Procedure, Rule 13.9, Cal. Code Regs., tit. 20, § 13.9.) Those "matters" are listed in Evidence Code sections 451 and 452. Courts are required to take official notice of matters covered by Evidence Code section 451. Section 452 gives courts discretion to take judicial notice of certain matters, including, in subdivision (c), official acts of the executive branch of federal government.

[30] UCAN did not dispute AT&T's request that the Commission accept the Form 502 utilization data itself, and the material was filed under seal. (Ruling Resolving Pending Motions at pp. 1-2.)

Because UCAN asserted that AT&T's calculations were made improperly, it remains unclear whether or not those calculations are material to this proceeding.

The rehearing application further contends that the Decision is in error because it only explained why it upheld the Presiding Officers ruling on the Form 502 utilization data by referring to AT&T's position on the 2006 NRUF Analysis. (Rehg. App. at p. 37.) This claim attempts to make the Decision's holding appear to be a non sequitur. However, the Decision's holding directly addressed the reasons AT&T advanced for overturning the Presiding Officer's evidentiary ruling on the Form 502 data.[31] AT&T had argued that "either all reports using FCC Form 502 data and the data itself should be admitted, or they should all be excluded." (Appeal of Presiding Officer's Decision at p. 35.) The Decision properly responded to this contention[32] by pointing out that AT&T's appeal relied on a claim of parity between two sets of materials that were, in fact, different. Both parties had agreed that the 2006 NRUF Analysis qualified for official notice, and AT&T explicitly had not objected to the Commission considering this information. On the other hand, the calculations AT&T had made using the Form 502 utilization data did not appear to be a proper subject for official notice, and the underlying methodology used to make those calculations was further in dispute.

It is also worth noting that the rehearing application is incorrect when it claims that AT&T sought to introduce the Form 502 utilization data for the purposes of rebutting the 2006 NRUF Analysis. (Compare Rehg. App. at p. 38.) These materials were not linked in the litigation phase of the proceeding because they were introduced independently by both parties in their concurrently filed Reply Briefs. AT&T in fact

[31] The Decision further points out that it based its decision to reject AT&T's appeal on the Commission's policy also of deferring to the judgment of the Presiding Officer in making evidentiary rulings. (Decision at pp. 48-49, 51.) Thus the rehearing application's claim that the Decision is in error because its explanation of the reasons for rejecting AT&T's appeal is "not … sufficient" does not take into account the complete rationale we relied upon. (Rehg. App. At p. 38.)

[32] The Decision did not respond to AT&T's claim in its appeal that the Form 502 utilization data met the requirements for official notice because it was likely to be accurate, presumably because that claim does not address the requirements of official notice under Evidence Code section 452, subdivision (c). (See Appeal of Presiding Officer's Decision at p. 34.)

relied upon the Form 502 Utilization data to rebut claims UCAN had made based on a Wireline Competition Bureau report. (AT&T's Reply Brief at p. 8 (fn. 28).)

The rehearing application further argues, however, that AT&T did not "unequivocally stipulate" that official notice should be granted to the 2006 NRUF Analysis. (Rehg. App. at p. 38.) According to the rehearing application, AT&T took the position that official notice could not be given to the 2006 NRUF Analysis without giving notice to the Form 502 utilization data. AT&T's response to UCAN's request for official notice states: "AT&T has no substantive objection to the Commission taking official notice of the report that is the subject of UCAN's requests as it is a report on file with the NANPA—an agency governed by the … FCC…." (AT&T's Response to Motion for Judicial Notice, October 2, 2006, at p. 1.) Further, the rehearing application does not demonstrate error because, as discussed above, the connection AT&T seeks to establish between 2006 NRUF Analysis and the Form 502 utilization data does not exist. As this analysis shows, the Presiding Officer correctly addressed the evidentiary dispute brought before him. However, this analysis shows that this dispute was complex, and we will modify the Decision to include a more extensive discussion on this topic.[33]

The rehearing application makes one further argument in favor of having its calculations based on the Form 502 utilization data considered by the Commission. AT&T claims that under the "completeness doctrine" embodied in Rule 13.7, subdivision (c), "AT&T had the legal right to have the carrier-specific Form 502 utilization data admitted into evidence in response to the 2006 NRUF [and NPA Exhaust Analysis] Report submitted by UCAN." (Rehg. App. at p. 38.) Rule 13.7 provides that if a party

[33] For the sake of consistency we will also delete a reference to information contained in AT&T's Form 10-K, filed with the Securities and Exchange Commission, because AT&T appears to claim that rules of official notice must be applied with equal precision in all instances. AT&T did not object to our use of this material, or contest its accuracy, but the parties do not appear to have taken positions on whether or not this material was a proper subject for official notice. We have thus determined not to rely upon it. We considered this information in the course of determining that AT&T was financially capable of paying the penalty we imposed, and we can reach that conclusion by relying on other material.

offers portions of a document into evidence, other parties may review the entire document and "offer in evidence other portions thereof believed material and relevant."

AT&T's claims misapply this rule. As an initial matter the rule does not say that a party has a "legal right" to have the Commission accept particular material into evidence. (Compare, Rehg. App. at p. 38.) Rule 13.7 only provides that a party may "offer" material into evidence. Further, Rule 13.7 speaks to the situation presented when a portion of a specific document is offered into evidence. In that case parties may review the entire document and offer "other portions" contained by the same document into evidence. The material at issue here—calculations made by AT&T based on the Form 502 utilization data—is clearly not "contain[ed]" in the 2006 NRUF Analysis. And AT&T does not allege that the underlying Form 502 utilization data is part of the 2006 NRUF and NPA Exhaust Analysis: it only claims that it is the data on which that document is based.

As discussed above, the rehearing application is also incorrect when it claims that AT&T sought to introduce the Form 502 Utilization Data into evidence "in response to the 2006 NRUF Report." (Rehg. App. at p. 38.) As explained above, AT&T sought to introduce its calculations based on Form 502 utilization data in response to a different report relied upon by UCAN: a document issued by the FCC's Wireline Competition Bureau. (AT&T Reply Brief at p. 8 (fn. 28).) AT&T, therefore, meets few, if any, of the criteria for the application of Rule 13.7, subdivision (c).

D. The Results of A Settlement in A Different Case Do Not Bar the Commission from Resolving This Case.

The rehearing application next asserts that the Decision's description of the extent of the record developed in the related case against Cox is in error. In its briefs and its Appeal of the POD, AT&T had asserted that the dismissal of the complaint against Cox barred the Commission from finding that AT&T had contravened section 2883. The Decision disagreed, pointing out that the law specifically allowed the Commission to evaluate individual proceedings on their own merits. Further the Decision notes that the Commission has authority to determine which matters warranted a commitment of

limited public agency resources and which matters had less of a priority in claiming those resources. (Decision at p. 26.)

The Decision also pointed out that the record in C.05-11-012 did not allow us to conclude that the proceeding against Cox and the proceeding against AT&T involved similar practices. The Decision found that while a complete evidentiary record had been developed in this proceeding, "[n]o such complete evidentiary record has been compiled for Cox's practices." (Decision at p. 55 (Finding of Fact 19).) The Decision also pointed out that the record that did exist in C.05-11-012 had not been briefed, and we had not had the opportunity to draw any conclusions in that case before it settled.

The rehearing application does not challenge our legal conclusion that the approval of a settlement in the Cox proceeding does not prevent us from penalizing AT&T in this case. However, the rehearing application claims that evidence exists that "establishes that AT&T's warm line practices are similar, if not identical to Cox's practices." (Rehg. App. at p. 32.) According to AT&T, "disregard of this evidence is error." (Rehg. App. at p. 34.) As an initial matter, this claim is not material because the rehearing application does not dispute the legal conclusion that we may properly determine how we will exercise its enforcement authority on a case by case basis. Claims that there are similarities between this case and the Cox case cannot demonstrate error when no impropriety results from the fact that one case settled and one was resolved through adjudication.

In addition, the rehearing application does not correctly describe the extent of the record in the Cox proceeding or the inferences that can be drawn from that record. AT&T relies on "statements made at … hearings" by Cox representatives to claim that a record has been developed that allows the Commission to find similarities between Cox's warm line policies and AT&T's policies. (Rehg. App. At p. 34.) There was no formal evidentiary hearing in the Cox case, and the statements to which AT&T refers were made at a prehearing conference. Moreover, simply identifying these statements does not show that a "complete evidentiary record" that would allow the Commission to conclusively determine if Cox's policies were the same as AT&T's was developed. Because C.05-11-

012 settled after the end of discovery, the Decision is correct in its description of the state of the record in that proceeding.

E. The Decision Properly Concluded that AT&T Did not Act In Good Faith, But Inadvertently Relies on the Wrong AT&T Subsidiary's Tariff as it Discusses Reparations.

In several places, the Decision made it clear that we strongly disapproved of AT&T's conduct. In Conclusion of Law 3, the Decision described the 180-day limit AT&T places on warm line service as "unreasonable, arbitrary and capricious." (Decision at p. 56.) We noted that AT&T's warm line policy had potentially serious public safety ramifications, but that it was adopted "without an assessment of need, number, facilities, and equipment availability...." (Decision at p. 33.) The Decision held that this conduct did not show good faith. (Decision at p. 30.) The Decision further found that the fact that AT&T engaged in impermissible ex parte contacts "concerning substantive issues affecting this proceeding … undermines any good faith claim in this proceeding." (Decision at pp. 30-31.) In addition, the Decision's discussion indicates that it considered AT&T's interpretations of section 2883 to be unreasonable, and that those unreasonable interpretations further detracted from AT&T's claims of good faith. (Decision at p. 40.)

In other places, the Decision characterizes AT&T's practices as amounting to "willful misconduct." (E.g., Decision at p. 33.) The Decision appears to have used the concepts of willful misconduct and bad faith to refer to the same unsatisfactory conduct on AT&T's part, and used these two concepts together when it sought to explain why no "safe harbor" was available to AT&T based on the facts of this case. (Decision at pp. 39-40.) In addition, the Decision relied on a finding of willful misconduct to conclude that the limitation of liability provisions in Rule 14 of AT&T's tariff should not apply its conduct here. The Decision determined the record in this proceeding was not sufficiently well developed to allow it to award reparations but, if the limitation of liability provision suspended, "customers and other persons [could] pursue other remedies otherwise available to them at law or in equity." (Decision at p. 35.)

The rehearing application claims the Decision errs when it finds that AT&T engaged in willful misconduct. (Rehg. App. at p. 31.) In reviewing this claim, we discovered that the Decision does not refer to the correct AT&T Tariff Rule 14, because two different AT&T entities have filed tariffs with this Commission. A brief explanation is in order. The company that is now called AT&T, formerly SBC Communications, Inc., acquired its current name following its acquisition of the former AT&T. The current AT&T is, and was, the parent of the California utility that is the defendant in this complaint. That California utility that currently does business under the name "AT&T California" and is, and was, identified by the number "U 1001 C" in its filings at the Commission. However, prior to the acquisition of the former AT&T, a subsidiary of the former AT&T also did business in California. That company was a "CLC" and a long-distance provider, and it filed tariffs covering those services.[34] That company is identified by the number "U 5002 C" in its formal filings with the Commission. The Decision inadvertently refers to the tariffs of the former CLC subsidiary of AT&T (U 5002 C) when it should have referred to the tariffs of the new AT&T's subsidiary, "AT&T California" (U 1001 C).

The correct tariff provision relating to the defendant's limitation of liability, Schedule Cal.P.U.C No. A2.2.1.14.A.1 reads:

> The provisions of this rule do not apply to errors and omissions caused by willful misconduct, fraudulent conduct or violations of law.

Because AT&T's conduct is a violation of law, AT&T's liability is not limited by Rule 14 of its tariff. As a result, it is not necessary for the Decision to find that AT&T engaged in willful misconduct in order to hold that "AT&T's liability to a customer or other person for damages resulting from its violation of [section] 2883 is not limited by its tariff." (Decision at p. 57 (Conclusion of Law 8).) We will modify the Decision so it refers to the correct tariff provision, and we will simplify the interchangeable use of

[34] A description of the regulatory framework for CLCs appears at footnote 36, above.

concepts of willful misconduct and lack of good faith by referring only to a lack of good faith.

F. The Decision Correctly Concluded that No "Safe Harbor" Shields AT&T From Liability Under Section 2883.

The rehearing application asserts that the law creates a "safe harbor" that prevents companies from being found to have committed a "statutory violation if a good faith attempt has been made based on a tenable interpretation." (Rehg. App. at p. 28.) The authority cited by the rehearing application in support of this claim does not appear to be valid or on point. *White v. Davis* (2002) 108 Cal.App.4th 197, upon which the rehearing application relies, was reversed in part and remanded by the California Supreme Court in *White v. Davis* (2003) 20 Cal.4th 528.[35] The language quoted in the rehearing application is, further, not a holding of *White v. Davis* (2002), *supra,* but rather dicta explaining the "circumstances" which led the Court of Appeal to avoid resolving a factual issue that had not been addressed by the trial court. (*White v. Davis* (2002), *supra,* 108 Cal.App.4th, at p. 231, fn. 13.) Moreover, the Court of Appeal in *White v. Davis* (2002), *supra*, was not stating a general rule. The court relied on the fact that the statute under consideration, the federal Fair Labor Standards Act, specifically provided that penalties may be excused under certain circumstances. (29 U.S.C.S. § 260.) As a result, the authority contained in *White v. Davis* (2002), *supra,* is not relevant here.

Similarly, the judgment in *Reynolds v. Hartford Financial Services Group, Inc.* (9th Cir. 2006) 435 F.3d 1081, also cited by the application for rehearing, was reversed and remanded by the U.S. Supreme Court in *Safeco Insurance Co. of America v. Burr* (2007) 551 U.S. 47, 167 L.Ed.2d 1045, 1067. While the Supreme Court concurred with some of the subsidiary holdings in *Reynolds v. Hartford Financial Services Group, Inc.*, it does not appear to have adopted the language quoted in the rehearing application. (Cf., *Spano v. Safeco Corp.* (9th Cir. 2008) 511 F.3d 1206.)

[35] Since this order cites section 1701, subdivision (a)'s provisions allowing for "informality" in Commission proceedings, the rehearing application's decision to allege error by relying on citations to cases that do not disclose their subsequent history is accepted.

Further, the principles that may be established by these three cases are not applicable here. These cases involved the federal Fair Credit Reporting Act. The Ninth Circuit held that the liability that act imposed for "willfully fail[ing] to comply" with certain of its provisions also applied in cases of reckless disregard of statutory duties. (*Ibid*.) The language from *Reynolds v. Hartford Financial Services Group, Inc., supra,* quoted in the application for rehearing stated the Ninth Circuit's view of how a company could avoid showing such reckless disregard. This case, on the other hand, does not involve the "willfully fail[ing] to comply" standard under the Fair Credit Reporting Act. Penalties were imposed in this case under section 2107 which imposes liability on utilities "which violate or fail to comply" with sections 201 through 2119 of the Public Utilities Code. As a result, *Reynolds v. Hartford Financial Services Group, Inc., supra,* even if it had not been reversed by the U.S. Supreme Court, is not applicable here.

Moreover, the rehearing application's claim that "AT&T's conduct should be evaluated in the context of the Commission not giving prior guidance" on the requirements of section 2883 relies on two faulty assumptions. (Rehg. App. at p. 28.) First, in the absence of any legal requirement that the Commission provide a "safe harbor" to AT&T this claim is a policy argument, and does not demonstrate legal error. Second, as UCAN pointed out, the Commission has not been silent about section 2883's requirements. The Commission's decisions indicate that it expected carriers to comply with the statute, and not to allow the complexity of their networks, or the regulatory structure, to prevent them from providing the required warm line access to emergency 911 service.

For example, when the Commission implemented local telephone competition, it described 911 service as "essential to every Californian" and ordered all carriers to take the necessary steps to make sure that new entrants (called "competitive carriers" or "CLCs") provided warm line service. (*Re Local Competition* [D.95-12-056] (1995) 63 Cal.P.U.C.2d 700, 726.) Specifically, the Commission made it clear that a type of CLC called a "reseller" had "an obligation to provide warm line service to a customer [that] shall continue as long as the CLC has an arrangement for resale service to the end

users' premises."[36] (*Re Local Competition* [D.95-12-056], *supra*, at p. 727.) The Commission further provided: "Following termination of the resale arrangement, the obligation to provide warm line service shall revert to the underlying facilities based" carrier whose facilities the reseller had relied upon. (*Ibid.*) The fact that the Commission required the obligation to provide warm line service to continue for the length of a resale agreement and then revert to another carrier when a resale agreement ended clearly indicates that the Commission construed section 2883 to establish a requirement that was not easily avoidable, and did not expire after a certain period of time.[37]

By way of further example, the rules adopted by the Commission when it granted certain CLCs certificates to operate as telephone carriers indicate that we expected warm line service to be provided not just at residences where billed service had been disconnected but at new residences as well. (*Competitive Local Exchange Service* [D.96-02-072] (1996) 65 Cal.P.U.C.2d 65, 94 (Ordering Paragraph 1).) The adopted rules stated that warm line service applied both in the case of disconnected billed service and "for newly installed lines." (*Id.* at p. 107.) This description of section 2883's requirements is consistent with the Decision's rejection of AT&T's contention that the statute was written in way that obviated the need to provide warm line service at new residences. Thus, the rehearing application is incorrect to claim that the Decision

[36] Under the regulatory scheme of the 1990s, resellers had no telephone facilities of their own and relied on services provided through an arrangement with an underlying "facilities based" carrier. By requiring warm line service to remain in effect as long as the reseller "has an arrangement for resale service to the end user's premises" the Commission ensured that a reseller's obligation to provide warm line service lasted as long as its relationship with the underlying carrier lasted, rather than only as long as its relationship with its customer lasted.

[37] UCAN's Response to AT&T's Appeal of the Presiding Officer's decision reviews several other Commission decisions at pp. 20-27, including a decision that stated section 2883 required lines to be in place to provide warm line service "at all times." (*Open Access to Bottleneck Services* [D.96-08-021] (1996) 67 Cal.P.U.C.2d 221, 243.) It is also important to note that in most respects the statute's requirements are so straightforward they do not create the uncertainty that AT&T contends exists. (Cf., Decision at pp. 9, 13.) For example, AT&T is incorrect to assert that it could not have know that its 180-day policy contravened the statute because it received no guidance on "whether or not there is a time limit to the obligation to continue to provide warm dial tone." (Rehg. App. at p. 29.) Section 2883 contains a clear directive that warm line service must be provided and the language of the statute provides no indication that a carrier may place time limits on the provision of warm line service.

"establishes a first blush interpretation of the statute since it was enacted in 1995."[38] (Rehg. App. at p. 29.)

In addition, past decisions give no indication that we interpreted section 2883 to allow carriers to curtail warm line service—unless they encountered a specific situation where facilities were physically unavailable at the actual time when warm line service was curtailed. One decision addressed a situation where warm line service was curtailed, *Bayside Village Apartments v. Pacific Bell* [D.97-11-029] (1997) 76 Cal.P.U.C.2d 491. The facts of this decision involved a shortage of facilities at an apartment building. This shortage of facilities sometimes required the oldest warm line connection to be disconnected when new tenants arrived and required the use of that equipment to receive service. (*Id.* at p. 495.) Thus, *Bayside Village Apartments v. Pacific Bell* [D.97-11-029], *supra,* suggests that we condoned the termination of warm line service where there was is a specifically-identifiable lack of equipment that precluded a carrier from providing service to subscribers of billed service, but it does not suggest that a carrier could legally terminate warm line service based on the potential that a shortage of facilities might develop in the future. As this review of our past decisions demonstrates, the claim that "[n]one of these decisions provides any guidance whatsoever" is inaccurate and does not demonstrate error. (Cf., Rehg. App. at p. 28.)

Finally, the Decision correctly found that AT&T's "safe harbor" theory is inapplicable here for another reason: because AT&T did not engage in a good faith attempt to comply with section 2883. As discussed above, it does not appear that AT&T considered or evaluated the relevant holdings contained in our past decisions as it determined to curtail warm line service. The Decision also points out that "AT&T's

[38] The rehearing application attempts to minimize the effect of the Commission's previous decisions by claiming that they are not specifically addressed to the issues presented in this case and therefore "cannot suffice." (Rehg. App. at pp. 28-29.) However the safe harbor theory that AT&T advances requires it to make an effort to "determine the correct meaning of the statute" and, specifically to avoid "opinions that provide creative but unlikely answers to 'issues of first impression.'" (*Reynolds v. Hartford Financial Services Group, Inc., supra,* at p. 1099.) The claim that section 2883 was written in such a way that the very circumstances that would make it unnecessary to provide warm line service at a new residence are the factors that trigger the requirement to provide such service would likely fall into this category.

termination policy 'was implemented without the analysis of facilities and equipment availability, number availability or the needs of customers in the specific areas affected.'" (Decision at pp. 29-30, 39.) Under those circumstances it was not error for the Decision to deny AT&T a "safe harbor."

G. The Protections Afforded Under the Due Process Clauses of the United States and California Constitutions Do Not Prevent This Commission from Fining A Regulated Utility for Violating a Statute.

The rehearing application asserts that the Decision "violates AT&T's right to due process by imposing a penalty without providing constitutionally adequate notice of the prohibited conduct." (Rehg. App. at p. 39 (capitalization altered).) However, as discussed above, section 2883 provides a clear description of the warm line requirements that the Legislature imposed on regulated telephone carriers. (See pages 6, 58, above.) The Decision specifically points out that it did not "create new standards and retroactively enforce[] them against" AT&T. Instead, we applied an existing statute to a regulated utility that is "charged with notice of what conduct is prohibited under applicable statutes…." (Decision at p. 26.)

Moreover, as discussed above, our past decisions discussing section 2883's requirements are not vague or inconsistent. Those decisions clearly articulate the principle that access to emergency 911 service via a warm line connection is an essential service that is to be provided to every Californian. (*Re Local Competition* [D.95-12-056], *supra,* 63 Cal.P.U.C.2d at p. 726.) The rehearing application, however, relies upon *General Elec. Co. v. EPA* (D.C. Cir. 1986) 53 F.3d 1324 and similar cases for the proposition that in the "absence of notice" an agency may not impose a civil penalty. These cases describe principles that are specific to the federal administrative system, and do not apply here. In *General Elec. Co. v. EPA, supra,* the regulated entity, General Electric ("GE"), began recycling solvents contaminated with PCBs. GE distilled the solvent to produce a highly toxic residue, which it incinerated, and a quantity of recycled solvent that was "nearly pure" with probably undetectable levels of contamination. (*Id.* at p. 1326.) The recycled solvent was reused. The distillation process complied with

applicable regulations. (*Ibid.*) The court noted that GE's process "produc[ed] environmental benefits." (*Id.* at p. 1327.) Nevertheless, the EPA interpreted its regulations to require that the solvent be incinerated immediately after its first use and fined GE for undertaking its recycling program. (*Ibid.*)

The court found that federal law required it to defer "to 'permissible' regulatory interpretations that diverge significantly from what a first-time reader of the regulations might conclude was the 'best' interpretation of their language." (*General Elec. Co. v. EPA, supra,* at p. 1327.) As a result, the court determined that it could not overturn the EPA's interpretation of its regulations in this case. (*Id.* at p. 1330.) Nevertheless, the court also found that that the EPA's interpretation was "so far from a reasonable person's understanding of the regulation" that it could not allow the EPA to impose a fine without giving prior notice that it had interpreted its regulation in this particular way. (*Ibid.*)

This narrow principle of federal administrative law does not support the rehearing application's broad claim that the Commission cannot impose penalties on AT&T "without any proposed rules or regulations." (Rehg. App. at p. 40.) Except for the provisions of section 2883, subdivision (c), discussed above at pages 29-36, nothing in the statute suggests that the legislatively-imposed warm line requirement is not enforceable unless the Commission issues further rules or regulations. Moreover, the interpretations at issue in the cases cited in the rehearing application stray from the plain language of the underlying regulations. (*General Elec. Co. v. EPA, supra*, at p. 1330.) It has been found that these "cases from the District of Columbia Circuit" should be construed narrowly and, specifically, "do not stand for the proposition that any ambiguity in a regulation bars punishment…." (*United States v. Lachman* (1st Cir. 2004) 387 F.3d 42, 57, see also Pub. Util. Code, §§ 1702, 2107.) Thus it is not clear that these cases can provide any guidance in the case of a self-executing statute whose requirements did not become the subject of follow-on regulations, and the rehearing application's claims do not demonstrate error.

One type of due process concern that might be relevant here is described in the principle of "void for vagueness." The rehearing application in fact asserts that the Decision is in error because section 2883 does not meet the standard articulated in *Grayned v. City of Rockford* (1972) 408 U.S. 104, 107. Principles of void for vagueness are most often addressed in criminal cases or free speech cases. The U.S. Supreme Court has held:

> A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.

(*U.S. v. Willaims* (2008) _ U.S. __, 170 L.Ed.2d 650, 657, citing *Hill* v. *Colorado* (2000) 530 U.S. 703, 732.)

The rehearing application implies that issues of discriminatory enforcement are relevant here. AT&T refers to the dismissal of the Cox complaint and claims that the March 1998 Letter informed Commission staff of AT&T's policy, and the Commission took no action as a result. However, the fact that the Commission dismissed the Cox complaint at the request of the parties does not show that the underlying requirements of the statute are unclear. Nor does the dismissal of this case at the request of the parties show that the Commission, which served as decision-maker, not prosecutor, is selectively enforcing the statute. Similarly, as discussed above, the March 1998 Letter was written in such a way that it did not inform staff that AT&T had a adopted a policy that might be in contravention of section 2883. The letter stated that AT&T had decided to provide warm line service for only 180 days, but the letter incorrectly tried to place this action in context by stating that warm line service was only required on an "interim[,]" not continuous, basis. (See above at pp. 26-27.) Such a letter does not amount to "notice" that would allow staff to "question[] AT&T's… practices" as the rehearing application claims. (Rehg. App. at p. 39.)[39]

[39] However, we note that the Decision referred to the March 1998 Letter as if it were written by the

(continued on next page)

In terms of the statue's language itself, the rehearing application re-asserts its claim that in this proceeding the Commission interpreted section 2883 for the first time, and used this complaint case as "the means for announcing a particular interpretation." (Rehg. App. at p. 40.) To the contrary, the Decision followed the plain language of section 2883 and applied its terms to the facts at hand. The Decision further did not announce any new or "particular" interpretation of the statute. Rather, in applying the law to the facts of this case, the Decision found that the statute's language was straightforward, and it did not apply second-order interpretational techniques such as reviewing section 2883's legislative history in order to determine it's meaning.[40] Instead the Decision considered the record to determine if it showed that AT&T had complied with the clear requirements of the statute.[41] As discussed above at pages 61-63, if AT&T was not aware of section 2883's requirements it was not because the statute was unclear but because AT&T did not engage an a good faith effort to determine the statute's requirements.

Finally, the rehearing application contends that the Decision deprived AT&T of due process of law when it determined that AT&T did not provide adequate notice of its warm line policies. The Decision considered the "minimum [] customer information standard" of section 2896, subdivision (a) in conjunction with section 2883, subdivision (c) when it evaluated the notice provided by AT&T and found that notice to be inadequate. According to the rehearing application, AT&T had no notice that the Commission would consider this issue and it was thereby deprived of an opportunity to

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(continued from previous page)
witness who provided the letter in an attachment to her testimony. We will modify the Decision to refer more clearly to this letter.

[40] For example, section 2883 is not vague about the question of whether carriers can impose time limits on warm line service. As we explained above, the statute contains no language that suggests time limits are permissible, and our past decisions have both explicitly and implicitly held that the obligation to provide warm line service does not expire after a certain period of time.

[41] For example, the question of numbering concerns does not involve interpretation of the statute. The Decision's holdings on that question are based on an evaluation of the record that found the generic material submitted by AT&T was insufficient to demonstrate that a limitation in technology or facilities required AT&T to adopt its warm line policy. (Decision at pp. 17-20.)

defend itself. In fact, UCAN's Opening Brief asserted both that AT&T had a specific obligation to provide notice of its warm line service and that AT&T was under a general obligation to provide notice "to customers of all their telephone options, and AT&T's own conduct." (UCAN's Opening Brief at p. 48.) UCAN further reviewed a series of Commission decisions that established generally applicable notice requirements for telephone utilities and asserted that the requirement to provide notice of warm line service was "[f]airly encompassed within such rulings." (UCAN's Opening Brief, August 25, 2006, at pp. 49-50.) Section 2869, subdivision (a), codifies the requirements of the cases UCAN discussed. (Cf., *UCAN v. Pacific Bell* [D.01-09-058], *supra*, at p. 17 (slip op.).) AT&T received UCAN's Opening Brief, and filed a Reply to that pleading on September 15, 2006. Further notice was provided to AT&T when the POD, a recommended decision proposed by the Presiding Officer, was made public. (Cf., Rules of Practice and Procedure, Rule 14.1, Cal. Code Regs., tit. 20, § 14.1, subd. (a).) AT&T responded to the POD's discussion of section 2894, subdivision (a) by appealing that aspect of the POD to the Commission, which considered AT&T's contentions as it issued the Decision. (Pub. Util. Code, § 1701.2, subd. (a).) Due process requires that a party be provided with notice, and an opportunity to be heard. The rehearing application does not explain why these procedures did no afford it dues process of law, nor did AT&T suggest during the conduct of these proceedings what additional procedures should have been afforded to it on this issue.

H. Statutes of Limitation Neither Apply to This Administrative Proceeding, Nor Do They Prevent AT&T from Being Penalized.

The rehearing application asserts that the Decision is in error for imposing penalties for the period from May 13, 1997 to August 15, 2006. The rehearing application relies on two provisions in the Code of Civil Procedure ("CCP") which it claims govern proceedings before the Commission: CCP section 338 and CCP section 340, subdivision (b). However, it is clearly established that the statutes of limitations contained in the CCP do not apply to administrative proceedings, as the Decision

explained. (Decision at pp. 46-47.) We cited clear authority holding, in the context of an appeal of an administrative decision, that the statute of limitations contained in CCP section 338 only applies: "to the commencement of civil actions and civil special proceedings [citations], which this was not." (*Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61.Cal.App.4th 1357, 1361-1362, quoting *Little Company of Mary Hospital v. Belshe* (1997) 53 Cal. App. 4th 325, 329.)

The application for rehearing, however, asserts that the statutes of limitation contained in the CCP do, in fact apply to the Commission for two reasons. First, a "general legislative policy" has bound the state of California "with respect to the bringing of actions for the enforcement of any and all such rights as may accrue to the state." (Rehg. App. at p. 35, citing *Marin Healthcare v. Sutter Health* (2002) 103 Cal.App.4th 861.) This "general legislative policy[,]" which was noted in *People v. Osgood* (1930) 104 Cal.App. 133, 135, weighs against any claim of legislative immunity by the state of California in court proceedings. Although the rehearing application claims that this principle prevents us from fining AT&T because the Commission is "an arm of the state[,]" it does not explain how this general principle overturns the specific rule that the CCP's statutes of limitations do not apply in administrative proceedings. (Compare, *Little Company of Mary Hospital v. Belshe*, *supra*, at p. 329, Rehg. App. at p. 35.) Nor does the rehearing application explain how a principle that looks to the identity of a party contradicts a rule that looks to the nature of the proceeding involved.

Second, the rehearing application asserts that the authority relied upon in the Decision is inapplicable because the underlying facts in the leading cases did not involve the imposition of penalties. However, the rulings in these cases are not based on the particular facts involved. These cases state a general principle of law, namely: "Statutes of limitations found in the Code of Civil Procedure, however, do not apply to administrative actions." (*Little Company of Mary Hospital v. Belshe*, *supra*, at p. 329, citing *Bernd v. Eu* (1979) 100 Cal. App. 3d 511, 515.) Nevertheless the rehearing application also claims that the Decision was in error because it did not discuss AT&T's attempt to distinguish these cases. (Rehg. App. at p. 36.) The cases state a clear,

dispositive rule, not limited by the court to the facts before it. Therefore AT&T's attempt to distinguish these cases based on their underlying facts does not appear to be material and does not require discussion.

More importantly, AT&T's contentions about the statutes of limitation were also immaterial because they addressed the measure of time that may be used to calculate a penalty, while statutes of limitations address when an action may be brought. Because AT&T engaged in one continuing violation, which was on-going when this case was brought, "no credible argument can be brought that UCAN did not bring a timely action within the applicable statute of limitations." (Decision at p. 47.) We gave our rationale for finding against AT&T on this issue, and the Decision was not required to make further findings on additional issues. (Cf., *Greyhound Lines, Inc. v. Public Utilities Com.* (1967), *supra,* at p. 811.)

The rehearing application further asserts that Commission precedent supports AT&T's position. According to the rehearing application, "the Commission has itself recognized that" a statute of limitations found in the CCP might apply in some circumstances. The decision relied upon by AT&T, *Strawberry Property Owners Association v. Conlin-Strawberry Water Company, Inc.* [D.97-10-032] (1997) 76 Cal.P.U.C.2d 46, does not contain such a holding. That decision rejected a claim that a penalty was barred by CCP section 340 by pointing out that even under "any conceivably applicable statute of limitations" the case at issue had been timely commenced. (*Id.* at p. 50.) Commission precedent, in fact, supports the Decision's result. In *Bidwell Water Company* [D.99-04-028] (1999) 85 Cal.P.U.C.2d 667, 671, we explicitly rejected a claim that statutes of limitations contained in the CCP prevented it from levying a fine because "statutes of limitations contained in the Code of Civil Procedure do not apply to administrative actions."

I. The Decision's Findings Explain Why We Penalized AT&T for its Illegal Conduct.

The rehearing application's final claim of error relies on section 1705. AT&T asserts that two of the Decision's findings do not sufficiently explain why we

reached our ultimate conclusion. First, the rehearing application claims that Finding of Fact 7, which addresses numbering issues, is insufficient because the issue was of such importance to this proceeding that it merited more than one finding of fact. (Rehg. App. at p. 42.) In support of this claim, the rehearing application asserts that Finding of Fact 7 is in error because it does not agree with AT&T's claim that prior Commission decisions on numbering or the 2006 Activity Report demonstrate that it was providing warm in compliance with the statute. Such claims do not demonstrate error. However, we note that Finding of Fact 7 contains more than one specific holding. We will modify the Decision so it contains "separately stated" findings of fact on the issue of numbering. These modifications will also make our findings more specific, in order to better explain why the Decision concluded that generalized claims about numbering issues did not show that AT&T was providing warm line service "to the extent" that its technology or facilities permitted, or that numbering concerns precluded AT&T from providing both warm line service and service to subscribers of billed service.

Second, the rehearing application claims the holding that AT&T's conduct demonstrated a lack of good faith is not sufficiently supported by Finding of Fact 18. That finding correctly states that AT&T's contravention of the ex parte rules was indicative of a lack of good faith. (Rehg. App. at p. 42.) However, as discussed above, the Decision's discussion states several other reasons why we disapproved of AT&T's conduct. We will modify the Decision so this analysis is reflected in our findings of fact.

IV. CONCLUSION

In this order, we have considered each of the rehearing application's several claims of error. Many of these claims are based on a misunderstanding of the Decision's holdings. Other claims rely on inapplicable principles of law. This order explains the Decision's reasoning in order to make it clear that the factual findings made in the decision and the legal conclusions it reaches are correct. In addition, the Decision itself will be modified, among other things, to make it clearer, and to correct the citation to AT&T's Tariff Rule 14. Once modified, the application for rehearing of D.08-08-017 should be denied. The following ordering paragraphs achieve this result.

Therefore **IT IS ORDERED** that:

1. The last paragraph in Section 4, "Questions Presented" that appears on page six, is modified to read:

> In addition, AT&T's contentions raise the issue of whether the provisions of section 2883 relieve a carrier of its 911 access obligation in the circumstances present here. Two provisions in the statute qualify the obligation to provide warm line service. Subsection (a) requires local exchange carriers. "to the extent permitted by existing technology or facilities" to provide access to 911 services. Subsection (e) further states: "Nothing in this section shall require a local telephone corporation to provide '911' access . . . if doing so would preclude providing service to subscribers of residential telephone service." These provisions should be read to create an exception that is stated twice in the statute: a carrier need not comply with the full extent of section 2883's requirements if it faces certain obstacles. AT&T claims this exception applies to its circumstances because of numbering concerns. (AT&T's Opening Brief at pp. 2, 6-7.)

2. Section 4, "Burden of Proof" on pages six and seven, is modified in its entirety to read:

> UCAN has the burden of establishing the allegations set forth in its complaint by a preponderance of evidence. AT&T argues that UCAN also has the burden of establishing, by a preponderance of evidence, that none of the statutory provisions that allow a carrier to curtail warm line service under certain circumstances apply to AT&T.
>
> AT&T's claim that the exception that allows warm line service to be curtailed applies here will be treated as a defense. In order to prevail in this proceeding UCAN will not be required to prove the negative proposition that none of the circumstances allowing a carrier to curtail warm line service apply to AT&T. AT&T is incorrect in assuming that UCAN bears the burden of proving that no statutory exception applies in order to prevail. If UCAN makes a case that the warm line service provided by AT&T does not comply with section 2883's general requirements, then AT&T, in order to prevail, must prove that the statute's exceptions do in fact justify its warm line policy. AT&T cannot prevail simply if it

> "casts doubt" on UCAN's claims—it must show that the statutory provisions it claims are applicable do in fact apply. (Cf., AT&T's Opening Brief at p. 2.)
>
> Evidence Code § 500 provides appropriate guidance and will be followed here: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."[3] It is especially appropriate for AT&T to bear the burden of proving that an exception that AT&T claims justifies its conduct applies to the particular facts of AT&T's situation. Most of the information necessary to make such a showing is uniquely within AT&T's possession.

3. The topic heading for section six, on page seven, is modified to read: "**6. What Facilities Are Used To Provide Telephone Service?**"

4. A new sentence is added at the end of the first, partial, paragraph on page eight, following the reference to footnote 4. That sentence reads:

> This description of what is necessary to provide telephone service should not be confused with the question of what constitutes a "telephone connection" as that term is used in § 2883. That question is addressed below.

5. The last two sentences of the last paragraph of Section 7.1, which appear on page nine, immediately following the reference to footnote five are deleted and replaced with the following:

> Further, carriers have a continuing obligation under § 2883(a) to provide 911 access from these residential units—the statute does not state that this obligation is interim or temporary. This obligation exists under § 2883(b) even if AT&T discontinued residential service "for nonpayment of any delinquent account or indebtedness owed by the subscriber to the telephone corporation." Thus, as UCAN points out, unless certain specific conditions exist that excuse a carrier

[3] *See also* City of Brentwood v. Central Valley Regional Water Quality Control Bd., 123 Cal. App. 4th 714, 725 (1st Dist. 2004) (when charged with wastewater permit violations, alleged polluter has burden of proving that statutory exceptions are available).

> from complying with § 2883's requirements, a policy of terminating warm line service after a certain period of time is not valid under the statute. As discussed above in connection with the burden of proof, AT&T's specific contention that § 2883 allowed it to implement its warm line policy in response to numbering concerns will be considered separately, as a defense. In light of the fact that AT&T adopted a state-wide policy of terminating warm line service after approximately 180 days, even though UCAN pointed out that numbering usage varies by area, it is appropriate to require AT&T to prove its claim that its policy is justified by numbering concerns.

6. The first clause of the first sentence of the first full paragraph on page 12, which introduces the numbered list is modified to read:

> Both parties' expert witnesses provide helpful testimony to provide a more detailed understanding of the elements necessary to provide service over a residential phone connection:

7. The first full paragraph on page 14, which paragraph begins, "While we do not explore …" is modified to read:

> However, we reject AT&T's contention that the plain meaning of the statute requires us to conclude that a telephone connection is not present unless AT&T has taken steps to provide service over that connection. A statute should be read to ascertain and effectuate its purpose. It is obvious from the statute itself that the Legislature, in enacting § 2883, sought to expand the availability of 911 access, even in certain new residential units "regardless of whether an account has been established." This requirement is relatively unqualified, with only two provisions possibly creating a situation where a carrier would not be required to provide warm line service at a new residence. As discussed elsewhere, an exception allows a carrier to restrict the availability of 911 access in some circumstances because of limits in existing technology and facilities or if providing warm line service would preclude the carrier from providing service to other residential subscribers. The second provision, which AT&T contends is relevant here, requires a

> "telephone connection" to exist before warm line service is to be provided at new residences.

8. The second full paragraph on page 14, which paragraph begins, "Regardless of these two limitations …" is modified to read:

> We do not accept AT&T's tautology, i.e., that all the steps necessary to provide voice *service* must already have been taken before a telephone *connection* exists and makes the company statutorily obligated to provide 911 emergency voice access. Section 2883(a) contemplates that, once a "telephone connection" is in place, AT&T must do something: it must take the remaining steps to "provide access to '911' emergency service regardless of whether an account has been established[,]" unless an exception applies. In order to determine when this statutory requirement applies, we further consider both the meaning of "telephone connection" and how the exception related to existing technology and facilities applies in the typical new residential setting.

9. The second sentence of the paragraph spanning pages 15 and 16, which sentence begins, "We interpret …" is modified to read:

> We interpret the phrase "telephone connection" in section 2883 to mean: (a) a CT facility from the primary Minimum Point of Entry at the residential unit or complex to the line side of the central office's main distribution frame, and (b) the appropriate infrastructure on the residential side of the primary Minimum Point of Entry, including inside wiring, phone jacks, and in the case of a multiple dwelling building or complex wiring from the primary minimum point of entry to the residence's secondary Minimum Point of Entry.

10. The first full paragraph on page 16, which paragraph begins, "Because of the …" is modified to read:

> We note in passing that because of the "existing technology and facilities" provisions, § 2883 a carrier need not bring a CT facility to new residential structures solely for the purpose of providing 911 access, nor is a carrier required to attempt to provide warm line service in situations where the residence has not been outfitted with the necessary infrastructure (for

> example phone jacks, or a connection between the primary Minimum Point Of Entry and a secondary Minimum Point Of Entry). Once a CT facility is available and the residential unit is wired to the primary minimum point of entry (or secondary minimum point of entry, in the case of multiple dwelling units),[18] the carrier is responsible for taking all remaining steps necessary to provide 911 access, if requested by the residential owner or occupant (essentially the same step that would be required to provide billed service). Because the owner or occupant determines when construction is complete, and because a portion of the required infrastructure is under the control of the owner or occupant of the residence, we conclude a carrier's obligation to provide warm line service should begin when a CT facility is in place and the owner or occupant indicates that service should begin.

11. The second full paragraph on page 18, which paragraph begins, "AT&T also uses the…" is modified to read:

> AT&T also uses the June 2006 Central Office Code Assignment Activity Report, prepared by the North American Numbering Plan Administrator (NANPA), to argue that 20 of California's 27 Numbering Plan Areas (NPAs, commonly known as area codes) have been exhausted or are in jeopardy. AT&T, however, provides no explanation that allows us to understand the significance of the "exhausted" or "in jeopardy" characterizations of these area codes. Additionally, AT&T does not explain why a 180-day termination policy would be necessary for area codes not listed as "exhausted" or "in jeopardy."

12. The last three paragraphs of Section 7.4, appearing on pages 19-21, and beginning with the words, "For its part, UCAN …" are modified to read:

> UCAN made a number of arguments concerning numbering, several of which we find helpful and persuasive. UCAN pointed out that AT&T's evidence tends to show that numbering shortages are "possible" or that they "could" occur but not that these possibilities actually did occur. UCAN's

[18] "If the LUs are a part of a multiple dwelling/multiple building complex, the contractor/developer also must arrange to have the jacks in each unit wired to the secondary MPOE, and to have the secondary MPOEs wired to the primary MPOE." *Id.* at 6.

Opening Brief at 37-38. UCAN also suggests that AT&T's warm line policies were motivated by cost concerns rather than concerns about numbering resources. UCAN's Opening Brief at 44-46. In addition, UCAN provided rebuttal evidence that disputed AT&T's assertion that there was a state-wide lack of numbering resources in California, and disputed the AT&T's claims about the seriousness of numbering concerns. Specifically, UCAN presented and discussed a report issued by NANPA, the "2006 NRUF and NPA Exhaust Analysis,"[28] to rebut the conclusions AT&T drew from NANPA's June 2006 Central Office Code Assignment Activity Report. The Exhaust Analysis report attempts to estimate when numbering resources within a specific area code are likely to be exhausted and whether the time projected for exhaustion within a specific area code is increasing or decreasing. While AT&T asserts that its NANPA materials show that 20 of 27 California area codes were experiencing some form of numbering limitations ("exhausted" or "in jeopardy"), the report UCAN provided stated the time when the NANPA projected California area would begin to experience exhaust events, and two-thirds of those area codes were not projected to begin experiencing these events within 5 years.[29] This allows us to conclude that AT&T's position does not necessarily reflect the NANPA's views. UCAN also convincingly demonstrates, using material relied upon by AT&T, that AT&T's state-wide warm line policy is not rationally related to its stated purpose of proactively managing numbering resources to avoid shortages because limitations in available telephone numbers do not occur state-wide.[30]

AT&T has not carried its burden of showing that that a defense based on unavailable technology or facilities justifies

[28] In a ruling dated December 6, 2006, the Presiding Officer took official notice of this report.

[29] 2006 NRUF and NPA Exhaust Analysis, Exhibit A to Request for Judicial Notice of Report, September 15, 2006, at 9-10.

[30] The record does not disclose how many numbers AT&T controls or is likely to acquire in these 26 area codes in coming years. After the parties had stipulated to submitting the proceeding on the prepared testimony and stipulated exhibits, AT&T requested that the Commission take official notice of FCC Form 502, which was denied by the Presiding Officer. Because AT&T (not the FCC) generated the information in Form 502, official notice is impermissible under Rule 13.9 and California case law. *See* ALJ's Ruling Resolving Pending Motions re Record and Submitting Proceeding at 2-3 (Dec. 6, 2006).

its admitted curtailment of 911 access after 180 days and failure to connect new residential units when infrastructure is already in place. None of the material AT&T relies upon shows that numbering concerns resulted in any specific, "existing" limitations in AT&T's technology or facilities, or meant that providing warm line service as the statue otherwise required would have precluded it from providing billed service to other subscribers. Put another way, AT&T only identified generic facts showing that it was contending with numbering issues, but it failed to provide any material describing the "extent" to which these numbering issues affected its "technology or facilities[.]" Given the legislative purpose behind § 2883, AT&T's policies, to be permitted under the statute, would have to be closely tailored to the risk of exhaustion in a specific area code. AT&T's blanket, statewide policy of 180-day termination and failing to connect new residential units appear to be arbitrary measures because AT&T did not show that these measures bore a reasonable relationship to actual numbering projections in specific area codes.

In summary, AT&T has conceded that it applies a 180-day termination policy for most currently or previously occupied residential units where voice service has been voluntarily or involuntarily curtailed. AT&T has also conceded that it fails to connect new residential units even when a CT facility exists to the central office. AT&T claims that its policy is justified because § 2883 permits it to curtail warm line service under certain circumstances, but AT&T has not supported that claim by showing that its policy has a direct relationship to technology and facilities limitations — including numbering constraints. Thus AT&T did not carry its burden of proof for the defense it raised. Additionally AT&T's internal documents show that AT&T adopted its warm line policy in response to the possibility of a shortage in telephone numbers, but the carrier did not perform a more detailed analysis of its facilities and equipment, numbering availability or the needs of customers in specific locations in response to this generic concern. In fact, AT&T's internal documents support the inference that AT&T instituted its policy to achieve cost savings, and because it had recently developed the ability to easily and cheaply terminate warm line service en mass, rather than line by line. Given the

> information in the record, we conclude that the circumstances that allow a carrier to curtail warm line service were not present for AT&T on a state-wide basis, during the time period covered by the complaint.

13. The first full paragraph on page 23, which paragraph introduces the quotation from section 2896, subdivision (a), and begins "Whether or not…" is modified to read:

> Thus, whether or not the Commission has issued specific requirements under § 2883(c), we established a minimum disclosure obligation that carriers must meet. The requirements of this affirmative obligation include providing adequate 911 access information, so that customers are adequately informed of their choices. The Legislature has also established this minimum customer information standard set in § 2896(a), which provides:

14. The second full paragraph on page 23, which paragraph appears after the quotation from section 2896, subdivision (a), and begins "Sections 2883(c) and 2896(a) …" is modified to read:

> When sections 2883(c) and 2896(a) are considered together, it becomes clear that we, and the Legislature, have articulated the basic requirement carriers must follow. Carriers must give customers enough information about warm line service to make informed choices. When issuing rules or orders pursuant to § 2883, the Commission may determine the format of such information and increase the amount of information required; but the Commission may not require less than the statutory minimum information required of utilities by § 2896(a). As a result, lack of Commission action did not affect the basic requirement that carriers were under an obligation to follow.

15. The last sentence of the first full paragraph on page 24, which sentence begins, "Because we find that…" is deleted.

16. The second full paragraph on page 31, which paragraph begins, "The Commission takes official notice…" is deleted.

17. The third full paragraph on page 31, which paragraph begins, "Regarding the remaining criteria…" is modified to read:

> Regarding the remaining criteria for assessing penalties (financial ability, totality of the circumstances and precedent), several recent Commission decisions indicate that the size of the penalty imposed here is comparable to other recently imposed penalties, and far smaller other penalties imposed on AT&T. However, the conduct sanctioned here is somewhat unique from that penalized in other proceedings.

18. The last sentence in the first full paragraph on page 32, which sentence begins, "In this proceeding…" is modified to read:

> In this proceeding, AT&T's conduct is marked by a lack of good faith in attempting to discharge its statutory obligations.

19. The first sentence in the first full paragraph on page 33, which sentence begins, "Having examined the foregoing…" is modified to read:

> Having examined the foregoing factors and totality of circumstances, we believe AT&T did not engage in a good faith effort to discharge a statutory responsibility imposing an important public safety obligation (emergency 911 access), a violation that would have been more serious had we received evidence of personal injury or property damage as a consequence of this policy.

20. The second full paragraph on page 35, which paragraph begins, "While specific information…" is restated to read:

> While specific information is unavailable for us to order reparations or disgorgement, we will allow customers and other persons to pursue other remedies otherwise available to them at law or in equity. AT&T's failure to provide emergency access service in conformity with § 2883 is a violation of law. As a result, AT&T's tariff Rule 14, which limits AT&T's liability, does not insulate AT&T from liability for its conduct in this case. Schedule CAL. P.U.C. No. A2.2.1.14.A.1 states: "The provisions of this rule do not apply to errors and omissions caused by willful misconduct, fraudulent conduct, or violations of law." Because we cannot award reparations it is proper to make provisions so that

> customers who have been injured by AT&T's conduct can seek appropriate remedies.

21. The last sentence in the third full paragraph on page 37, which sentence begins, "With this showing…" is modified to read:

> Under the technical rules of evidence, with this showing it would become the defendant's burden to establish a defense, such as the unavailability of existing technology and facilities.[52]

22. The paragraph spanning pages 39 and 40, which paragraph begins "Second, as the POD determined…" is modified to read:

> Second, as the POD determined, AT&T did not engage in good faith in its failure to comply with § 2883, a precondition for application of its own standard. As the POD indicates, AT&T's termination policy "was implemented without the analysis of facilities and equipment availability, number availability, or the needs of the customers in the specific areas affected." POD at 30. This decision also indicates that AT&T's conduct did not meet requirements of good faith at pages 34, and 42. As a result, AT&T does not satisfy the good faith precondition for the lenient interpretation it seeks to invoke. This discussion also answers AT&T's related argument, set forth in Part III(F) of its brief, that there is no basis for the imposition of a penalty because its interpretation of § 2883 was reasonable. The POD justifies its conclusion why AT&T's termination policy was unreasonable.

23. The first full paragraph on page 41, which paragraph begins, "We also do not accept…" is modified to read:

> We also do not accept AT&T's continued urging that billed voice service must be in place before the carrier has a responsibility to provide 911 access. In the POD, we

[52] We note that in this case, UCAN has done more than what is required under this formulation of the law. UNAN demonstrated that section 2883 contains no time limit restricting the provision of warm line service, and further showed that AT&T's blanket, state-wide policy bore little relationship to numbering concerns that were transitory and limited to specific area codes. In light of these showings and the evidentiary principles discussed above, we find it entirely appropriate to require AT&T to demonstrate that its warm line policy was, in fact, required by numbering concerns.

> described AT&T's position as a "tautology, *i.e.*, voice service must already exist before the company is statutorily obligated to provide 911 emergency voice access." POD at 14. (This language was subsequently modified.) AT&T repeats this same refrain ("there is ... no basis to exclude certain elements included in AT&T's definition, namely the physical connection from the MDF [main distribution frame] to the switch ..."), AT&T App. Brief at 11, which if accepted would nullify any protection afforded by the statute. We do not believe the legislature contemplated a meaningless act in its adoption of § 2883. As the POD indicates, when a telephone connection and other prerequisites are in place, "AT&T must do something: it must take the remaining steps to provide access to '911' emergency service"—steps including making the physical connection from the main distribution frame to the switch. POD at 14

24. The first two full paragraphs on page 43 and the following paragraph spanning pages 43 and 44 are modified to read:

> Additionally, AT&T maintains that the POD commits legal error by not considering the letter attached as Attachment MJ-8 to Martha Johnson's testimony. (Exhibit 5.) AT&T alleges that this letter informed Commission staff that a disconnect policy was necessary due to numbering constraints. AT&T App. Brief at 14. We have considered the letter, but it does not support AT&T's interpretation. AT&T seems to make the argument that, by communicating the 180-day disconnect policy to Commission staff, the policy thereby became anointed as reasonable.
>
> To the contrary, the letter in Attachment MJ-8 informed Commission staff that "Pacific Bell is in the process of initiating an automated process to recapture useful telephone plant. Upon exceeding a 180-day time period, the QDT will be automatically broken to place its assigned plant facilities back onto the pool of available facilities for re-assignment to new customer service."
>
> While the letter then mentions the need for reserve capacity, the following paragraph indicates that the true basis for the disconnect policy is *cost—not* numbering shortages: "Although we have not conducted cost studies associated with leaving over-aged QDTs permanently in place, we

believe that the dollar amount would easily reach in the tens of millions of dollars." The letter further suggests that the development of new automated techniques making it possible to disconnect warm line service without employing expensive manual techniques may have prompted the carrier to adopt its policy. The letter then concludes with an unauthorized—and in our view incorrect—summary of statutory purpose: "The intent of the QDT was to provide an interim method to access emergency services . . . ." Absent facilities or numbering constraints in specific areas, we reject the notion (and we believe the legislature would agree) that emergency access was meant to be available only on an interim basis. And staff members who did not have a legal background or the benefit of extensive knowledge about the requirements applicable to warm line service would not be able to realize, given this context, that this letter was describing a potentially impermissible change to the carrier's warm line policy.

25. Section 11.8 spanning pages 47 and 48 is modified to read:

AT&T complains that the POD errs by canceling any protection the carrier might have to limited civil liability under its tariff. The POD originally withdrew the immunity conferred under Schedule CAL. P.U.C. No. A2-T, 2.14.1B because it concluded AT&T's warm line policy represented willful misconduct. Subsequently it was determined that AT&T's liability was limited under Schedule CAL. P.U.C. A2.2.1.14.A.1 and immunity was withdrawn as a result of the fact that AT&T's warm line policy was a violation of law. AT&T's appeal contends that the POD's conclusion regarding willful misconduct reached a conclusion beyond the allegations in UCAN's complaint. While this decision no longer refers to willful misconduct, we do believe that AT&T failed to act in good faith, and that UCAN alleged a deliberate corporate policy in violation of § 2883 ("However, SBC [AT&T] has admitted to implementing a policy where it in fact does so [terminates warm line access contrary to § 2883(b)]." UCAN First Amended Complaint April 17, 2006, at ¶ 18. The POD concludes, based on the facts, that AT&T had adopted a 180-day disconnect policy that "is unreasonable, arbitrary, and capricious and does not support an 'existing technology or facilities' exemption under § 2883(a)." POD at Conclusion of Law 3. Based on the arbitrary policy, Conclusion of Law 3, and other

> determinations made in the POD, the nullification of the tariff's protective language only replicates what § 2106 independently requires: "Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the Commission, shall be liable to the person or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom."

26. Section 11.10, spanning pages 50-51, is modified to read:

> AT&T's appeal asserts it was error for the POD to consider "a single FCC document introduced by UCAN for the first time in its reply brief," which occurred "On December 6, 2006, [while] the ALJ issued a ruling granting UCAN's request for official notice, and denying our request for official notice." AT&T App. Brief at 3 and 5. AT&T appears to contest the fact that we determined to consider a document offered by UCAN but did not consider a document AT&T offered. This claim does not contend with the fact that there is no parity between these two documents. AT&T did not oppose UCAN's request that we take official notice of its document, and stated that this document was a proper subject for official notice. AT&T's separate request that we take notice of its Form 502 utilization data was contested by UCAN, which argued, among other things, that the calculations AT&T made using this material used the wrong mathematical approach and the material would have to be tested at a hearing before we could rely on it. The Presiding Officer concluded that AT&T's calculations should be stricken, although AT&T's material was filed, under seal. *See* ALJ Ruling (Dec. 6, 2006). As previously discussed, we do not lightly disturb the evidentiary rulings of the Presiding Officer in our proceedings, and we endorse this ruling. The material does not appear to qualify for official notice and we find UCAN's concerns about the accuracy of AT&T's calculations to be persuasive.

27. Finding of Fact 7, spanning pages 52 and 53 is deleted and replaced with the following additional findings of fact:

7a. In general, the facts and arguments relied upon by AT&T to support its policy of terminating warm line service after approximately 180 days are too general because they only show that AT&T was contending with numbering issues, and they fail to describe the "extent" to which those numbering issues affected its "technology or facilities" or how the provision of service to subscribers would be precluded.

7b. AT&T's reference to Commission-approved area code splits is equivocal, suggesting both a growing demand for phone numbers and the ability of the regulatory process to respond to that need.

7c. AT&T's reference to the June 2006 Central Office Code Assignment Activity Report, prepared by the NANPA provides no means for understanding the significance of the "exhausted" or "in jeopardy" characterizations of 20 of California's 27 Numbering Plan Areas, and other material in the record suggests that the conclusions AT&T draws from this report may not necessarily reflect the position of the NANPA.

7d. AT&T adopted a blanket, state-wide policy to curtail warm line service even though the record showed that when the supply of available telephone numbers became restricted this occurred only in specific area codes, for a limited period of time. Because AT&T was unable to show that its policy bore a rational relationship to the numbering restrictions AT&T faced its policy was arbitrary.

7e. AT&T's internal documents show that AT&T's warm line policy was as adopted in response to a general concern that telephone numbers *could* be depleted, and no material in the record shows that AT&T quantified its need for numbers, assessed the limits of its facilities capabilities, considered equipment availability, or reviewed or attempted to update or verify its original 1997 analysis. Because terminating warm line service has potentially serious public safety ramifications, such conduct does not show good faith.

7f. AT&T's internal documents show that in addition to concerns about numbering, concerns about cost, and the recently developed ability to terminate warm line service automatically may have prompted the carrier to adopt its policy of terminating warm line service after approximately 180 days.

28. Finding of Fact 9, on page 53, is modified to read:

    9. If the "CT facility" described in this order has been installed between the residential unit and AT&T's central office; and the CT facility is connected to the residential unit's primary Minimum Point of Entry; and the building or complex contains the requisite internal infrastructure, as described in this order, then the additional steps necessary to make a telephone connection capable of providing service are relatively few and are automated. One manual activity, placing a jumper wire in the central office, generally takes a few minutes and is estimated to cost $18.99.

29. Finding of Fact 20 on page 55 is modified to read:

    The record does not reflect what portion of AT&T's revenues from May 13, 1977 through August 15, 2006, is attributable to its official emergency access policy, and we have no means to estimate the sum.

30. Conclusion of Law 8, on page 57, is restated to read:

    8. This decision concludes that AT&T violated § 2883. Under the terms of its tariff, Schedule CAL. P.U.C. A2.2.1.14.A.1, AT&T's liability is not limited when its conduct violates a statute. Accordingly, AT&T's liability to a customer or other person for damages resulting from its violation of § 2883 is not limited by its tariff.

31. Rehearing of D.08-08-017, as modified herein, is denied.

    This order is effective today.

    Dated April 16, 2009, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners